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No.

In the Supreme Court of the United States

October Term, 1982

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
Petitioners,

vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL, and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY, a general partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER EQUITABLE RELIEF MUST BE DENIED WHEN A PARTY AND ITS COUNSEL ENGAGE IN THE USE OF FALSE STATEMENTS IN THE COMPLAINT, IN SWORN TESTIMONY UNDER OATH, IN ANSWERS TO INTERROGATORIES, IN AFFIDAVITS AND IN PLEADINGS, FOR THE PURPOSE OF OBTAINING AND PRESERVING INJUNCTIVE RELIEF COMMANDING CONTINUED SPECIFIC PERFORMANCE. *Precision Instrument Mfg. Co., et al. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945).

WHETHER THE PUBLIC INTEREST DEMANDS THE COURT OF APPEALS, TENTH CIRCUIT, RECOGNIZE, MAINTAIN AND ENFORCE THE EQUITABLE PRINCIPLE THAT A PARTY SEEKING EQUITY DO SO WITH "CLEAN HANDS" AS A PREREQUISITE TO RECEIVING EQUITABLE RELIEF.

WHETHER THE COURT OF APPEALS, TENTH CIRCUIT, MAY EXCUSE "BAD FAITH" AND "FRAUD" IN THE PERFORMANCE OR ENFORCEMENT OF A CONTRACT IN DIRECT CONTRAVENTION OF THE MANDATE OF THE UNIFORM COMMERCIAL CODE, MISSOURI LAW, AND CONTROLLING CASE LAW IN OTHER CIRCUITS WHICH REQUIRES "GOOD FAITH" AND "FAIR DEALING" IN THE PERFORMANCE AND ENFORCEMENT OF ALL RIGHTS AND DUTIES UNDER A CONTRACT.

The caption of the case contains the identity of all interested parties.

II

WHETHER ONE PARTY TO A CONTRACT MAY, THROUGH BAD FAITH AND FRAUDULENT DESIGN, ATTEMPT TO DEPRIVE ANOTHER OF A VITAL RIGHT UNDER A CONTRACT WITHOUT COMMITTING A BREACH OR REPUDIATION OF THE CONTRACT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The majority opinion of the Court of Appeals, Tenth Circuit, dated July 6, 1982, is reported as 682 F.2d 883 (1982) and is reproduced as Appendix A hereto; the dissent of Barrett, Circuit Judge, filed July 14, 1982, is reproduced as Appendix B hereto; the Order dated August 9, 1982 denying the Petition for Rehearing (Suggestion For Rehearing *En Banc*) is reproduced as Appendix C hereto. The District Court Orders dated September 21, 1981, January 28, 1982 and January 29, 1982, are reproduced as Appendices D, E and F, respectively.

JURISDICTION

The opinion of the Court of Appeals, Tenth Circuit, was filed July 6, 1982; Petition for Rehearing was denied August 9, 1982. Jurisdiction is asserted upon the authority of 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Uniform Commercial Code §1-203 (20A Mo. Ann. Stat., §400.1-203 (Vernon's)) provides:

> **"Obligation Of Good Faith.**
>
> Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

2. Uniform Commercial Code §1-201(19) (20A Mo. Ann. Stat., §400.1-201(19) (Vernon's)) provides:

> " **'Good faith'** means honesty in fact in the conduct or transaction concerned."

3. Uniform Commercial Code §2-610 (20A Mo. Ann. Stat., §400.2-610 (Vernon's)) provides:

> **"Anticipatory Repudiation**
>
> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> (a) for a commercially reasonable time await performance by the repudiating party; or
>
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has

notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704)."

STATEMENT OF THE CASE

This case involves a coal purchase-supply agreement between Petitioners, the City of Springfield, Missouri and the Board of Public Utilities of Springfield, Missouri (hereafter referred to as the "City") and Respondents, Bill's Coal Company, Inc. and the general partners of Cherokee Coal Company (hereafter referred to as the "Coal Company"). Jurisdiction of the District Court was based on 28 U.S.C., Section 1332.

Of particular significance to the merits of the relief requested is the District Court's Findings of Fact and Conclusions of Law dated January 28, 1982 (Appendix E) beginning at page A51 through page A53, and at page A59 beginning "VI. *Purchaser's Bad Faith/Repudiation Claims,*" through the top of page A68, and page A74.

In 1970 the parties entered into a coal contract whereby the Coal Company agreed to supply certain of the City's coal requirements. The contract between the parties was amended numerous times, culminating in the "1979 Amendment" which was negotiated in April, 1979 and which is the subject of this dispute.

The 1979 Amendment is a variation of a requirements contract requiring the City to purchase a minimum of

495,000 tons of coal per year and a maximum of 605,000 tons of coal per year.

The 1979 Amendment changed, among other things, the method for determining the price to be charged for coal and the manner in which the City could cancel the agreement if the Coal Company's price for coal became excessive. It provided the Coal Company with absolute discretion in setting its price, but provided the City with a right to cancel the contract if it could obtain coal from a qualified competitor at a price of 25% less than the Coal Company's price.

The principal draftsman of the amended contract was Mr. Richard W. Lowry, an attorney representing the Coal Company in the negotiations. Mr. Lowry, as well as other counsel for the Coal Company, recognized after the final negotiating session (on April 12, 1979), but prior to the signing of the amended agreement by the parties, that the language in the proposed agreement "could be read" as requiring a comparison of the Coal Company's F.O.B. mine price excluding transportation charges, to a competitor's F.O.B. mine price plus the cost of transportation to the City of Springfield in order to invoke the 25% cancellation clause. The principals of the Coal Company and its counsel also acknowledged at that time that such an interpretation would be contrary to the actual agreement.

Since transportation was a significant portion of the total cost, a comparison of the Coal Company's price excluding transportation to a competitor's price including transportation would have made it virtually impossible for the City to ever cancel the agreement. (Appendix E, page A61, Para. 7.)

If the Coal Company were successful in requiring such a price comparison it would be in an extremely

favorable position since it had absolute discretion in setting its price, and the City would, for all practical purposes, have no right to cancel the agreement. The City and its ratepayers, on the other hand, would be in the extremely precarious position of being at the mercy of the Coal Company.

For an undisclosed reason, the Coal Company chose not to advise the City of this "possible" interpretation, but chose instead to remain silent. As a result, the contract was executed by both parties containing Mr. Lowry's proposed language.

Later that year (in the fall of 1979), the Coal Company set into motion a carefully conceived plan to attempt to force the City to compare its F.O.B. mine price (*excluding* transportation) to a competitor's F.O.B. mine price *including* transportation in order to cancel the agreement.

On December 29, 1979, the President of the Coal Company and its counsel hand-delivered a letter to the City whereby the Coal Company simultaneously increased its price for the next fiscal year by 43% and demanded that the City compare the Coal Company's F.O.B. mine price to a competitor's price plus transportation in order to exercise the 25% cancellation clause. The City, knowing that such a requirement was contrary to the actual agreement, proceeded to obtain bids, and being of the opinion that it had a bid which entitled it to cancel the contract under the 25% cancellation provision, sent a notice of cancellation to the Coal Company and on March 28, 1980 filed a complaint for declaratory judgment seeking an interpretation of the agreement and cancellation of the contract.

The Coal Company continued with its plan to deprive the City of its right to cancel the agreement and responded with a separate action on April 8, 1980 seeking

specific performance and injunctive relief to compel performance of the contract and to prevent the City from cancelling the contract unless it compared the Coal Company's F.O.B. mine price to a competitor's price plus transportation. The president of the Coal Company, Mr. James F. Hirlinger, filed an affidavit attesting to the truth of the matters set forth in the Complaint (i.e., that a comparison of the Coal Company's F.O.B. mine price to a competitor's price plus transportation was required). Mr. Hirlinger later admitted under oath that such a comparison was neither intended nor required.

The Coal Company was successful in obtaining an injunction and the City was ordered to perform the contract. The Coal Company thereafter furthered its plan by repeating its contentions regarding the price comparison in its First Amended Complaint, Second Amended Complaint and Third Amended Complaint, affidavits, interrogatory answers and testimony under oath.

The Court found:

> "8. The continuation of the Seller's plan is evidenced by Seller's Second Amended Complaint, filed July 16, 1980 and Seller's Third Amended Complaint, filed September 5, 1980. Both amended complaints assert that the take-out clause in the 1979 Amendment required Purchaser to compare Seller's F.O.B. mine price to a competitor's price plus transportation.
>
> 9. When Mr. Hirlinger was deposed in December of 1980, he continued to assert on behalf of Seller . . . the take-out comparison. . . ." (Appendix E, page A61.)

In response to a request for production of documents filed by the City, the Coal Company inadvertently produced documents partially revealing the bad faith nature of its plan to impose the aforementioned price comparison

upon the City and its ratepayers. The Coal Company prohibited further discovery in connection with those documents alleging that they were protected by the attorney-client privilege. Notwithstanding the Coal Company's efforts to conceal the plan, its likelihood of success began to diminish.

In a hearing on the City's motion for summary judgment, the District Court stated that the price comparison was going to have to be on the "same terms".

The Coal Company realized that its position was (in the words of Mr. Lowry) "no longer tenable" and conceded that it had known all along that the contract did not require such a price comparison, but notwithstanding, did nothing to abandon its position until it became apparent, shortly before trial, that the plan would not succeed. The District Court found:

> "11. Seller maintained its position regarding the take-out price comparison until the first Pretrial Order was filed on April 28, 1981. Seller had decided that it 'was not a tenable position' to continue to maintain (Lowry Deposition, p. 510). The Court has voiced its concern over Seller's assertion of a position which it knew to be inapposite to the intention of the contracting parties." (Appendix E, pages A61-A62.)

Thereafter, Coal Company, in the Pretrial Order of April 28, 1981, set forth what it claimed to be the actual agreement and true intention of the parties.

In the Pretrial Order, Coal Company asserted for the first time that, consistent with the District Court's statement in the hearing on the motion for summary judgment, the comparison was to be on an "equal basis" and that the actual agreement and true intention of the parties was contrary to its earlier position and actually

required a comparison of its price plus transportation to a competitor's price plus transportation.

Regardless of this last minute confession, the Coal Company, for nearly one and one-half years, refused to honor the contract according to its terms and sought through its bad faith position on the required price comparison and through mandatory injunctive relief to effectively deprive the City of its right to cancel the contract. The Coal Company came forward with the truth only when it was clear that the plan was no longer tenable.

The City contended that the Coal Company's bad faith conduct in attempting to deprive it of its right to cancel the contract if the Coal Company's price became excessive constituted a breach and repudiation of the contract. The District Court agreed.

The following Findings of Fact and Conclusions of Law by the District Court are particularly noteworthy:

> "On December 10, 1979, Mr. Lowry wrote Mr. White (General Counsel to Purchaser) a letter confirming the substance of their telephone conversation. In a blind postscript to that same letter (Plaintiff's Exhibit 36) sent to (the principals of the Coal Company) Mr. Lowry reminded Seller of 'the plan' Seller was preparing in regard to the upcoming bid solicitation by Purchaser. The 'plan' was to demand and require that Purchaser compare Seller's f.o.b. mine price to a competitor's price including transportation to the City of Springfield in order to terminate the contract under the 'take-out' clause." (Appendix E, page A51.)
>
> . . .
>
> "The purpose of making the demand was to put the Coal Company in a more favorable position (Lowry deposition, pp. 446-457). Although there is some tes-

timony that Seller adopted its 'plan' for use as a negotiating tool, Seller's latter actions are inconsistent with such a contention. The Court finds no excuse or justification for Seller's December 28, 1979 demand upon Purchaser. Seller knew and in fact admits that it has always known the intended meaning of the price comparison in the take-out clause. The Court further finds that Seller knew that it was not entitled to the price comparison upon which it was insisting." (Appendix E, page A60, Paragraph 3.)

. . .

"Seller intended to impose on Purchaser a condition which was not part of the original contract and demanded that it would treat non-compliance with that additional condition as breach of the contract. Accordingly Seller has repudiated the 1979 Amendment by manifesting a positive intention not to perform the contract according to its terms." (Appendix E, page A64, Paragraph 7.)

. . .

"Seller's actions were not honest mistakes. Seller was attempting to gain unfair advantage by its demands on Purchaser. It was a calculated plan which Seller carried out from December of 1979 until April of 1981." (Appendix E, page A67, Paragraph 16.)

. . .

"There can be no doubt that Seller failed to act in good faith in this respect." (Appendix E, page A61, Paragraph 10.)

. . .

"If Seller had been successful in requiring Purchaser to use the price comparison demanded by Seller, it would have been virtually impossible for any qualified

bidder to take Seller out of the contract. Seller's 'plan' gave Seller even more latitude in setting its contractual price than the contract already provided."

(Appendix E, page A61, Paragraph 7.)

. . .

"This Court cannot condone Seller's conduct. To allow Seller to retain the benefits of the contract would, in the opinion of this Court, result in an injustice. The Court concludes that Seller's violation of its contractual obligations of good faith constitutes a breach of the 1979 Amendment. Because of Seller's breach and repudiation, Purchaser is entitled to the remedy of cancellation." (Appendix E, page A68.)

The District Court dissolved the preliminary injunction by separate order on January 29, 1982 (Appendix F) upon its decision dated January 28, 1982 (Appendix E).

Notwithstanding the District Court's extensive Findings of Fact and Conclusions of Law on the Coal Company's bad faith, the Court of Appeals reinstated the preliminary injunction and ordered continued specific performance of the 1979 Amendment.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, Tenth Circuit, has rendered a decision so repugnant to the principles of equity and fair play firmly established by the Supreme Court of the United States and other Circuit Courts, thereby departing from the usual and accepted course of judicial proceedings, as to necessitate the intervention of this Court.

By ordering the injunction reinstated and ordering continuing specific performance of the contract despite

the Coal Company's "bad faith conduct" (perpetuated by motions for injunctive relief supported by false affidavits, false testimony under oath, false answers to interrogatories, false pleadings, etc.), the majority ignored the necessity of parties seeking equity to do so with clean hands, and enunciated a standard of conduct for parties in litigation totally devoid of any requirements of "truth", "honesty" or "good faith".

The majority opinion commits two very basic, yet very grave errors. The first error is that the Court of Appeals' decision fails to recognize that the Coal Company's bad faith fraudulent conduct has a direct bearing upon its right to equitable injunctive relief. The second error is the Court's failure to recognize that bad faith or fraudulent conduct of one party which attempts to deprive another of his rights under a contract (or to prevent, hinder, or frustrate the contract as a whole) constitutes a breach or repudiation of the contract.

The Coal Company asserted its so-called "interpretation" of the contract admittedly fully knowing the "interpretation" was false. Their false assertions were not limited to the City, but were made in federal court pleadings and testimony.

The Court of Appeals, however, ruled that ". . . if the interpretation might prevail in a court of law, the Seller [Coal Company] has a right to urge it". The Court of Appeals' standard not only totally excuses Coal Company's and its counsel's conduct in this case, but encourages disregard for the pronouncements of the Supreme Court and other Circuit Courts, as well as the standards and dignity of the court system and counsel's obligation under the Code of Professional Responsibility and Federal Rules of Civil Procedure. Therefore, this Court should exercise its power of supervision, grant the Writ of Certiorari, and reverse the Court of Appeals.

The Supreme Court enunciated the appropriate standard in *Precision Instrument Mfg. Co., et al. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15 (1945) when the Court stated:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughran v. Loughran, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 397-399.

While the Court of Appeals concluded that ". . . this type of bad faith behavior is not to be regarded as a contract breach or repudiation" (Appendix A, page A7), it elected to ignore City's argument and legal authority that Coal Company's acknowledged bad faith and unclean hands precludes Coal Company from obtaining equitable relief.

The majority's decision on this issue is in direct conflict with the law as pronounced by the Supreme Court of the State of Missouri (the law applicable in this diversity action), the statutory law of the State of Missouri as enacted through the adoption of the Uniform Commercial Code, and in direct conflict with the law as stated by the Missouri Supreme Court, which applies for the purpose of this decision.

The Coal Company is undeniably guilty of engaging in a bad faith fraudulent scheme to deprive the City of its right of termination, thereby leaving the City and its ratepayers at the Coal Company's mercy.

The District Court rightfully found that such conduct constituted a breach and repudiation of the contract and dissolved the injunctive relief it had previously granted. On appeal, the majority opinion held that this "type of bad faith conduct" does not constitute a breach or repudiation of the contract, and ordered that the injunction in favor of the Coal Company be restored.

However, the dissenting opinion by the Honorable James E. Barrett (Appendix B) concurred with the District Court's finding that when a party practices "fraud" as did the Coal Company, a breach and repudiation has occurred and the injunctive relief should be dissolved.

The majority's conclusion that bad faith fraudulent conduct cannot operate as a breach or repudiation ignores the opinions of other circuits and the Uniform Commercial Code, which clearly provide that the obligation of good faith applies to performance and enforcement of rights and duties under a contract and that a bad faith untenable construction of a contract can constitute a breach and repudiation of a contract as can a bad faith demand for more in the way of counter performance than is required under the contract.

Section 1-203 of the Uniform Commercial Code, Mo. Ann. Stat., Section 400.1-203 (Vernon's) provides:

> "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

The Official Comments to Section 1-203 provide in pertinent part:

> "This section sets forth the basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance or enforcement of all agreements or duties."

Section 1-201(19) of the Code, Mo. Ann. Stat., Section 400.1-201(19) provides:

> "Good faith means honesty in fact in the conduct or transaction concerned."

The Eighth Circuit Court of Appeals, in applying Missouri law in *Bunge Corp v. Recker*, 519 F.2d 449 at 452 (8th Cir. 1975), stated:

> "Bad faith generally implies or involves actual or constructive fraud or a design to mislead or deceive another. It is an action not prompted by an honest mistake but rather by some interested or sinister motive. We are convinced that a lack of 'good faith' as defined in the Code means some type of affirmative action consisting of at least constructive fraud or a design to mislead or deceive another."

Common sense would dictate that a breach of the obligation to act in good faith is a breach of an implied condition of the contract and thus a breach of the contract itself.

See the Restatement (Second) of Contracts:

> "e. Good faith in enforcement. The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g. Sections 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, *asserting an interpretation contrary to one's own understanding, or falsification of facts.*" Restatement (Second) of Contracts, Sec. 205 (1979) at page 102. (Emphasis added.)

Whether the Coal Company's conduct is classified as "performance" or "enforcement" it was clearly a plan designed to mislead or deceive the City and the District Court into requiring a comparison of its F.O.B. mine price to a competitor's in order to invoke the cancellation clause of the contract.

The majority opinion fails to recognize the distinction between the advancement of a "good faith" yet erroneous construction which does not constitute a breach or repudiation and a "bad faith" untenable construction which does.

The Tenth Circuit previously stated in *Walker v. Shasta Minerals and Chemical Co.*, 352 F.2d 634, 638 (10th Cir. 1965):

> ". . . an offer to perform made in accordance with the promissor's interpretation of the contract, if made in good faith although it may be erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach."

The Tenth Circuit's decision in *Walker* contains one very critical qualification, that being that the erroneous interpretation be "made in good faith". The opinion in *Walker* anticipated and articulated the principles of good

faith, honesty and fair dealing which form the very cornerstone of the Uniform Commercial Code.

The Eighth Circuit, following the principles set forth in *Walker*, held in *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 257 (8th Cir. 1969) that a *bad faith* interpretation or construction constitutes a breach:

> "As stated in *W.J. Walker v. Shasta Minerals & Chemical Co.*, 352 F.2d 634, 638 (10th Cir. 1965), an offer to perform made in accordance with the promissor's interpretation of the contract, even though erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach *if that offer was made in good faith. Kiewit's lack of good faith is evidenced from its $143,000.00* offer, which was but 10% of Summit's estimate . . . and its June 29 comment to Summit that the latter could do better with the other subs than it could with Kiewit arranging some backfill settlement." (Emphasis added.)

In another case citing *Walker*, the Ninth Circuit, in *Pacific Coast Eng. Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889, 894 (9th Cir. 1969), stated:

> "Generally, when there is a disagreement as to the meaning of terms in a contract, one party's offer to perform in accordance with its interpretation is not itself an anticipatory breach (cite omitted).
>
> . . .
>
> If the offer appears to be made in the good faith belief that the offeror's interpretation is correct, that will be evidence of his continuing adherence to the agreement (cites omitted)."

However, when the interpretation is advanced in bad faith, it is inconsistent with a "continuing adherence to the agreement" and is evidence that the party is repudiating the agreement.

In holding that "this type of bad faith behavior" cannot constitute a breach or repudiation, the majority opinion again fails to seize upon the significance of the bad faith nature of the conduct, and fails to apply the principles of established Missouri law as enunciated in Mo. Ann. Stat. Sec. 400.2-610 (Vernon's) governing anticipatory repudiation and the case of *Miran Investment Co. v. Medical West Bldg. Corp.*, 414 S.W.2d 297 (Mo. 1967).

This case does not involve a good faith honest mistake over the terms of the contract, but rather involves a deliberate and carefully conceived plan to impose a condition of cancellation (i.e., a comparison of a competitor's F.O.B. mine price plus transportation to the Coal Company's F.O.B. mine price) on the City which was not part of the original agreement.

In so doing, the Coal Company was guilty of demanding performance of conditions which it knew were beyond the terms of the agreement.

Under the existing Missouri law, such conduct clearly constitutes a breach and repudiation of the contract.

See the Missouri Supreme Court's decision in *Miran Investment Co. v. Medical West Bldg. Corp., supra,* at 302-303.

Section 2-610 of the Code, Mo. Ann. Stat. Sec. 400.2-610 (Vernon's), *Comment 2,* states the same rule of law regarding a demand for performance beyond the terms of the agreement. The Eighth Circuit, in *National Farmers Organization v. Bartlett Feed & Grain Co.*, 560 F.2d 1350, 1356-57 (8th Cir. 1977), in applying Missouri law, adopted *Miran.*

Accord 1A Corbin, *Contracts,* Sec. 85, page 367 (1950 & Supp. 1971):

> "An attempt to vary the terms of a contract may be made in such a way, however, as to be reasonably understood as a repudiation and to be in itself an actionable breach."

See also, 5 Corbin, Sec. 538, page 73:

> "If A used or understood the words in a particular sense and B in fact knew that he did, it is regarded as 'fraudulent' for B to try to hold A in accordance with a different meaning, however 'normal' or common that meaning may be."

The majority opinion is clearly wrong in its statement that "this type of bad faith behavior is not to be regarded as a contract breach or repudiation".

See also, *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974):

> "Insisting on terms not in the contract has been held in New York to constitute an anticipatory repudiation (cites omitted)." *Supra* at 290.

See also, *REA Express, Inc. v. Interway Corp.*, 538 F. 2d 953, 955 (2d Cir. 1976):

> "Under New York law, insistence upon terms which are not contained in a contract constitutes an anticipatory repudiation thereof (cites omitted)." *Supra* at 955.

CONCLUSION

The Court of Appeals' failure to insist that a party and its counsel seeking equitable relief should do so with clean hands, if not corrected, will serve to undermine the standard of honesty and fair dealings expected and required in the federal courts.

Therefore, the Writ of Certiorari to the Court of Appeals, Tenth Circuit, should issue, the decision to reinstate the preliminary injunction should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

APPENDIX A

BILL'S COAL COMPANY, INC., and William D. Patch, Savanna Lee Patch, Lloyd F. Burkdoll, Anna Faye Burkdoll, John E. Burkdoll and Virginia L. Burkdoll, all the general partners of and d/b/a Cherokee Coal Company, a general partnership,
Plaintiffs-Appellants,

v.

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a City Utilities, and City of Springfield, Missouri,
Defendants-Appellees.

Nos. 82-1297, 82-1303.

United States Court of Appeals,
Tenth Circuit.

July 6, 1982.

Rehearing Denied Aug. 9, 1982.

Coal supplier appealed from order entered by the United States District Court for the Northern District of Oklahoma, James O. Ellison, J., dissolving injunction compelling utility to continue purchasing its coal requirements in accord with contract with supplier. The Court of Appeals, Logan, Circuit Judge, held that coal supplier's urging of interpretation of termination clause supplier knew did not reflect either its intent or that of utility in making of requirements contract was not type of bad-faith behavior which could be regarded, under Missouri law, as contract breach or repudiation.

Injunction ordered to continue in effect; case remanded.

Barrett, Circuit Judge, dissented and will file separate opinion at a later date.

1. Contracts (Key) 312(1), 313(2)

A "breach of contract" is failure to provide other party with goods or services as contract requires, but a "repudiation of contract" is party's manifestation that it is not going to provide such goods or services when they will be due at some future date. V.A.M.S. §§ 400.2-601 to 400.2-608, 400.2-610, 400.2-612.

See publication Words and Phrases for other judicial constructions and definitions.

2. Sales (Key) 151

Coal supplier's urging of interpretation of termination clause supplier knew did not reflect either its intent or that of utility in making of requirements contract was not type of bad-faith behavior which could be regarded, under Missouri law, as contract breach or repudiation. V.A.M.S. §§ 400.2-601 to 400.2-608, 400.2-610, 400.2-612.

Paul Scott Kelly, Jr., Kansas City, Mo. (George P. Coughlin of Gage & Tucker, Kansas City, Mo., and O. B. Johnston of Logan, Lowry, Johnston, Switzer & West, Vinita, Okl., with him on the brief), for plaintiffs-appellants.

Stan P. Doyle, Tulsa, Okl. (Steven M. Harris and James C. Thomas, of Doyle & Holmes, Tulsa, Okl., Mark E. Gardner of Woolsey, Fisher, Whiteaker, McDonald & Ansley, and Turner White III of Springfield, Mo., with him on the brief), for defendants-appellees.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

Bill's Coal Company, Inc. and related parties ("Bill's Coal") appeal the trial court's order dissolving an injunction it previously had issued compelling the Board of Utilities of the City of Springfield, Missouri ("the Utility") to continue purchasing its coal requirements from Bill's Coal in accord with the long-term contract the Utility entered into with Bill's Coal in 1970, as amended, clarified, and restated in 1979. In March 1980 the Utility informed Bill's Coal it was invoking the contract's termination clause. Bill's Coal responded by bringing this diversity action charging the Utility with breach of contract, and requesting damages and injunctive relief.

With the parties' agreement, the trial court granted an injunction requiring both parties to perform under the contract pending further developments. The parties agreed to try the dispute to the court, which conducted the proceedings in three phases. At the end of the trial's second phase, the court granted the Utility's motion to dissolve the injunction because it found Bill's Coal had committed a bad faith breach and repudiation of the contract when it repeatedly urged an interpretation of the termination clause it knew was contrary to the parties' intent when they signed the 1979 contract amendment. Bill's Coal appealed the order dissolving the injunction, which it has a right to do even though the litigation has not yet ended. *See* 28 U.S.C. § 1292(a). We ordered the appeal accelerated and, in the interim, ordered the injunction restored.

As amended, the contract calls for Bill's Coal to furnish all coal the Utility requires for its operations, with a specified annual minimum of 495,000 tons, and a maximum of 605,000 tons. By the end of each calendar year, Bill's Coal must tell the Utility what price it will charge for the fiscal year beginning the following April 1. The termina-

tion clause provides that after receiving Bill's Coal's price quote, the Utility has until the end of March to solicit bids from other coal companies. If a company able to meet the contract specifications submits a bid at least 25% under Bill's Coal's price, the Utility can terminate its contract with Bill's Coal effective March 31; if the bid is at least 15% less, the effective date of termination will be the following March 31. The termination clause provides that if invoked, Bill's Coal can require the Utility to provide written evidence of the bid that allows it to terminate the contract.

The contract provides Bill's Coal is to quote its price F.O.B. its Garland, Kansas mine. The Utility then pays for transporting the coal to Springfield, Missouri. The trial court's "bad faith" finding arose with regard to language in the termination clause that requires the price comparison to be between Bill's Coal's quoted price and a competitor's "delivered price." Both Bill's Coal and the Utility agree they understood the comparison was to be between the price Bill's Coal quoted F.O.B. Garland plus the freight costs the Utility could expect to incur, and the price the competitor quoted plus the freight costs the Utility could expect to incur, i.e., in both cases the total costs delivered to the Utility's coal yard in Springfield. However, apparently with an eye toward possible litigation or compromise of various disagreements between the parties over contract terms, Bill's Coal, at its attorney's suggestion, took the "position"—which it maintained through the early stages of the litigation—that according to the contract, the Utility could not invoke the termination clause unless a competitor's bid plus the expected freight costs for delivery to Springfield was at least 15% less than Bill's Coal's price F.O.B. Garland, without any addition for freight costs from Garland. When Bill's Coal expressed that view to the Utility's general manager, the

general manager rejected the interpretation and said if Bill's Coal maintained that position, he would "see them in court"—which he did.

After receiving Bill's Coal's price quote for the fiscal year commencing April 1, 1980, and the bids solicited from other coal companies, the Utility claimed the bids it received gave it a right to terminate its contract with Bill's Coal. It notified Bill's Coal it was exercising its right to terminate the contract effective March 31 of the subsequent year, 1981 (the 15% option). Apparently unsure of its position, the Utility simultaneously brought a declaratory relief action to determine its rights and obligations under the contract. Immediately thereafter, Bill's Coal filed suit, claiming the Utility had breached the contract, and the Utility raised the same charge in a counterclaim. The declaratory judgment action and the two breach of contract allegations were consolidated for trial in three phases: Phase I to interpret the 1979 amended and restated agreement; Phase II to determine whether either party was in breach; and Phase III to calculate any damages due.

The parties have agreed that Missouri law applies to this action. During discovery, Bill's Coal inadvertently gave the Utility a document setting forth the attorney's plan for adopting the "position" with respect to interpreting the termination clause. The Utility then added to its counterclaim a cause of action for breach of the obligation to act in good faith, which the Uniform Commercial Code (UCC) implies in all contracts. *See* 20A *Mo.Ann.Stat.* § 400.1-203 (Vernon).

At the end of Phase I of the trial, the court found that the termination clause was ambiguous and that the parties intended to compare Bill's Coal's price plus freight to Springfield with the price quoted by a competitor plus freight. At the end of Phase II of the trial, the court

ordered the injunction dissolved, even though it found that Bill's Coal's occasional shipments of substandard coal were not a material breach of the contract, and that the Utility had not properly exercised the contract's termination clause—the only issues litigated other than the allegation based upon Bill's Coal's "position" on the bid price required for termination. The court lifted the injunction because it concluded that Bill's Coal's "position" was unjustified; that if the Utility had accepted the interpretation Bill's Coal asserted, the Utility would have found it virtually impossible to exercise the termination clause; and that Bill's Coal had adopted the "position" in bad faith. The court found that the plan was a breach of the good faith obligation and, furthermore, amounted to a repudiation of the contract because it manifested an intention not to abide by the terms of the contract. The trial court concluded that whether viewing the "position" either as a breach or a repudiation, the Utility was entitled to the remedy of cancelling the contract. Therefore, the court granted the Utility's motion to dissolve the injunction.

Bill's Coal raises three objections to the court's dissolution of the injunction because of a bad faith breach and repudiation. First, Bill's Coal contends Missouri courts have not and would not recognize a right of action based on a contracting party's failure to comply with the UCC's good faith obligation. Second, because the trial court found Bill's Coal's interpretation of the termination clause was "plausible,"[1] the court erred in concluding Bill's Coal

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1. By "plausible," the trial court probably concluded that a court might agree with the argument advanced by Bill's Coal that extrinsic evidence of the parties' intent was inadmissible since the contract words were unambiguous and that the words meant exactly what Bill's Coal claimed they meant. But we note that even if the clause were unambiguous, the Utility still would be entitled to introduce evidence of the parties' contrary intent in support of an action to have the writing reformed to reflect the parties' agreement. *See, e.g., Williams v. United Ins. Co.*, 613 S.W.2d 229, 231 (Mo.App. 1981).

had acted in bad faith. Third, even if Bill's Coal acted in bad faith and even if Missouri courts generally would recognize bad faith acts as a contract breach or repudiation, when the bad faith is limited to espousing an interpretation of the circumstances under which the other party can terminate the contract and does not interfere with the performance either party owes under the contract, that bad faith interpretation does not give the other contracting party a right to cancel the contract.

[1, 2] We do not address the first two arguments Bill's Coal makes since we agree that this type of bad faith behavior is not to be regarded as a contract breach or repudiation. In urging an interpretation of the termination clause it knew did not reflect the parties' intent, Bill's Coal did not affect either party's performance under the contract. A breach of a contract is a failure to provide the other party with the goods or services as the contract requires. *See* 20A *Mo.Ann.Stat.* §§ 400.2-601 to 608, 400.2-612; *Restatement (Second) of Contracts* §§ 235, 241, 243, 245 (1981). A repudiation is a party's manifestation that it is not going to provide those goods or services when they will be due at some future date. *See* 20A *Mo.Ann.Stat.* § 400.2-610; *Restatement (Second) of Contracts* § 250 (1981). The bad faith urging of a particular interpretation of a termination clause is neither a failure to perform contract obligations (breach) nor an indication those obligations will not be performed in the future (repudiation).

We can envision situations in which bad faith conduct might be actionable: for instance, if the Utility solicited bids from competing coal companies and Bill's Coal in some way coerced competitors into not submitting bids. That might constitute such a breach of Bill's Coal's good faith obligation as to allow the Utility to cancel the con-

tract.[2] But the mere urging of a particular interpretation is quite different. If a seller's interpretation of a termination clause is ludicrous, the buyer should ignore it; if the interpretation might prevail in a court of law, the seller has a right to urge it. If the party that wishes to invoke the termination clause is unsure of the merits of the other party's interpretation, it can either accept that interpretation, rely on its own interpretation, or obtain a declaratory judgment as to the meaning of the contract language.

Since we have found the trial court erred in its application of the law on the only issue it found against Bill's Coal in Phase II of the trial, the injunction we ordered reinstated should be continued in effect. *See Community Communications Co. v. City of Boulder*, 630 F.2d 704, 708-09 (10th Cir. 1980) *rev'd on other grounds*, ... U.S. ....., 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1350-51 (6th Cir. 1978).

Our review of the trial court's rulings has been restricted to the one issue treated in this opinion. We express no view on its other rulings in Phase I or II of the trial. The Utility raises questions in its motion for clarification and instructions concerning price to be paid and whether additional bond should be required. These should be addressed by the trial court after remand, in light of the conclusions in this opinion and the trial court's other rulings interpreting the contract.

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2. The only case the Utility cites that recognizes a cause of action for bad faith in connection with a termination clause, *Baker v. Ratzlaff*, 1 Kan.App.2d 285, 564 P.2d 153 (1977), is distinguishable. *Baker* holds that a party invoking a clause permitting termination in the event of nonpayment committed a breach of the good faith obligation if the party did not first request payment. A party's taking such affirmative acts is quite different from a party's urging a particular interpretation of the termination clause.

The case is hereby remanded for further proceedings consistent with this opinion.

BARRETT, Circuit Judge, dissents, and will file a separate opinion at a later date.

APPENDIX B

(Filed July 14, 1982)

Nos. 82-1297 and 82-1303—BILL'S COAL COMPANY, INC., et al. v. BOARD OF PUBLIC UTILITIES OF SPRINGIELD, MISSOURI, et al.

BARRETT, Circuit Judge, dissenting:

It is my view that the District Court correctly concluded that Bill's Coal's demand for more than it was entitled under the contract with Utility constitutes a repudiation under Section 2-610 of the Missouri Uniform Commercial Code (20A V.A.M.S. § 2-610), fully justifying the Court's January 29, 1982, order dissolving the injunction. Thus, I would affirm the District Court.

The main issue generating this litigation involves the "take-out" provision of the 1979 amendment to the coal contract. That provision states, *inter alia*, that if Utility can secure a bid . . . "at a delivered price of at least 25% less than the price quoted by [Bill's Coal] (adjusted to eliminate the depreciation credit referred to in paragraph 6) . . . [Utility] may by written notice cancel this agreement as of the end of the then current fiscal year."

Utility had until March of the year to exercise the take-out provision. At a meeting later in the same day that the 1979 amendment was drafted, an attorney representing Bill's Coal noted that the contract language could be viewed to require a comparison of Bill's Coal quoted f.o.b. mine price to any competitor's delivered price. However, this attorney stated then that such was not the intention of the parties; rather, the parties agreed and intended that a comparison under the take-out clause would be delivery price versus delivery price.

In December, 1979, Bill's Coal became aware that Utility was going to solicit bids and attempt to utilize the "take-out" provision. Bill's Coal then formulated a "plan" to block a take-out by insisting that Utility make a comparison of Bill's Coal's f.o.b. mine price to competitors' delivered price. When Bill's Coal supplied Utility with its f.o.b. mine price for 1980, it also "demanded" that Utility make the bid comparison in accordance with Bill's Coal's "plan". An agent of Utility vehemently rejected Bill's Coal's proposed comparison formula and informed Bill's Coal if it insisted on the formula that Utility would see Bill's Coal in court.

Inasmuch as Bill's Coal's mine is located substantially closer to Springfield's power plant than any of its competitors, a comparison between Bill's Coal's f.o.b. mine price to competitor's delivery price could hardly, if ever, result in a bid sufficient to trigger the take-out provision. Bill's Coal's f.o.b. mine price was substantially higher than any competitor's f.o.b. mine price.

Utility proceeded to solicit bids and to compare Bill's Coal's f.o.b. mine price to competitors' f.o.b. mine price. On March 27, 1980, Utility gave Bill's Coal notice of termination under the take-out clause. Utility thereafter filed a declaratory judgment action against Bill's Coal seeking a declaration of the relative rights and liabilities of the parties under the 1979 amendment. Bill's Coal filed a separate action against Utility for breach of contract. Bill Coal's action was subsequently consolidated with Utility's action. In all of its pleadings, Bill's Coal held fast to its interpretation of the comparison language of the take-out clause.

The parties agreed that the litigation should be divided into three phases. Phase I involved the interpretation of the take-out clause. The Court concluded that the take-out provision called for a delivery price versus de-

livery price comparison. It was only after this court finding that Bill's Coal finally abandoned its interpretation of the take-out clause. *It amended its pleadings to assert that the contract language was ambiguous and that the parties had always intended a delivery versus delivery price comparison. In response, Utility amended its complaint to allege anticipatory repudiation and bad faith on Seller's part.*

Phase II was conducted to determine liability. The Court found anticipatory repudiation by virtue of Bill's Coal's demand that Utility use a different price comparison than that which the parties had agreed to. The District Court recognized that although this is an unusual case on its facts, for anticipatory repudiation, the law appears clear that if a party, in bad faith, demands performance of the other party beyond the terms of the contract, and the demanding party conditions his own performance on the injured parties' performance of the additional terms, then there is an anticipatory repudiation by the demanding party. The District Court thus found anticipatory repudiation. It specifically found that Bill's Coal's interpretation of the take-out provision was the result of bad faith in that it was not an honestly held interpretation because Bill's Coal had agreed to a different interpretation. The Court also found a separate cause of action for bad faith.

Based upon these conclusions, the District Court dissolved the injunction, and rendered detailed findings of fact and conclusions of law with which I agree. Specifically, the Court found that because Bill's Coal admitted that it knew at all times that the parties had in fact agreed to the delivery price versus delivery price interpretation of the "take-out" provision of the 1979 amendment, Bill's Coal did not entertain an honest mistake of contract interpreta-

tion when it insisted on its f.o.b. versus delivery price position. This, the Court concluded, was a bad faith contention. I agree.

When a party practices fraud, *i.e.*, assertion of a position it knows to be absolutely contrary to the agreement, it repudiates the contract if this false assertion, as here, impairs the value of the contract. This principle applies here inasmuch as the practical effect of Bill's Coal's false interpretation was to block any "take-out" and thus lock Utility into Bill's Coal's price. It follows that by forcing Utility to pay what may well be exorbitant prices under the contract, Bill's Coal impaired the value of the contract to Utility.

The majority opinion anchors its holding, it seems to me, on the proposition that Bill's Coal has "performed" under the contract because it has, at all times, delivered coal to Utility. This holding does not meet the issues addressed by the District Court relating to performance. What was the full performance promised? In terms of money values, it had to be Bill's Coal's promise to permit Utility to exercise the "take-out" provision in good faith by obtaining bona fide competitive bids based on delivery price versus delivery price. This plain intent was absolutely frustrated by the bad faith practiced by Bill's Coal. This bad faith could not be corrected. Accordingly, we are not here dealing with mere "deviations" from full performance which are inadvertent or unintentional. The "deviation" here is all pervasive and due to Bill's Coal's bad faith. It impaired the structure of the contract as a whole. It cannot be "repaired" and thus the contract must be terminated.

We have here an admitted, acknowledged manifestation on the part of Bill's Coal to frustrate the "termination" clause of the contract. The intention is unequivocal. *Re-*

statement of Contracts, (First), §§ 314, 315 and 318 (1932), as supplemented, states that in a bilateral contract, one who has failed, without justification, to perform all or any part of what is promised in a contract has breached it (here, Bill's Coal's refusal to recognize the right of Utility to receive proper competitive bids) and, further, that one who, like Bill's Coal, has prevented or hindered Utility from determining whether it is bound to the condition of further purchases of coal from Bill's Coal (performance of a return promise to purchase) is guilty of an anticipatory breach which constitutes a total breach of contract. Under § 318(a) it is stated that ". . . a positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties" constitutes an anticipatory breach.

U.C.C. § 2-610, Comment 1 states that "anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." In *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974), relied upon by the trial court, it was held that although a demand by a party to a contract for more than the contract calls for in the way of counter-performance is not in itself a repudiation, when a fair reading leads to the conclusion that it amounts to a statement of intention not to perform except on conditions which *go beyond the contract, it becomes a repudiation.* "In order to constitute an anticipatory breach of contract, there must be a definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance *when the time fixed for it in the contract arrives.*" 4 Corbin on Contracts, § 973, p. 905. [Emphasis supplied]. And, "Where the two

contracting parties differ as to the interpretation of a contract . . . an offer to perform in accordance with his own interpretation . . . [will] constitute such a breach, [if] the offer . . . be accompanied by a clear manifestation of intention not to perform in accordance with any other interpretation." 4 Corbin on Contracts, § 973 at p. 911.

I would dissolve the injunction we reinstated and affirm the District Court.

APPENDIX C

JULY TERM - August 9, 1982

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

No. 82-1297 and No. 82-1303

BILL'S COAL COMPANY, INC., and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY, a general partnership,
Plaintiffs-Appellants,

vs.

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES and CITY OF SPRINGFIELD, MISSOURI,
Defendants-Appellees.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Barrett voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips, Clerk
Howard K. Phillips, Clerk

APPENDIX D

(Filed September 2, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

Consolidated Civil Action Nos.
80-C-187-E and 80-C-580-E

BILL'S COAL COMPANY, INC., et al.,
Plaintiffs,

vs.

BOARD OF PUBLIC UTILITIES OF THE CITY OF
SPRINGFIELD, MISSOURI, et al.,
Defendants.

CITY OF SPRINGFIELD, MISSOURI,
Plaintiff and counter-defendant,

and

BOARD OF PUBLIC UTILITIES OF THE CITY OF
SPRINGFIELD, MISSOURI,
Counter-defendant,

vs.

BILL'S COAL COMPANY, INC., et. al.,
Defendants and counterclaimants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PHASE I

This is a consolidated proceeding encompassing two civil actions between resident parties of Oklahoma and Kansas and resident parties of Missouri. The Oklahoma-Kansas parties are Bill's Coal Company, Inc. and all the general partners of Cherokee Coal Company (collectively referred to as "Seller"). The Missouri parties are the City

of Springfield, Missouri, and the Board of Public Utilities of the City of Springfield, Missouri, d/b/a City Utilities (collectively referred to as "Purchaser.") Both actions involve a certain contract entitled "Amendment, Clarification and Restatement of the 1970 Coal Contract, as Amended" (the "1979 Amendment"). Jurisdiction was invoked and exists pursuant to 28 U.S.C. § 1332.

In the Pretrial Order filed on April 28, 1981, the parties divided the trial of this action into three phases. Phase I is limited to issues surrounding interpretation of the 1979 Amendment. Additionally, in the Pretrial Order, the parties stipulated to certain facts. The Court hereby adopts these facts and will make specific reference to them, when necessary and appropriate, in this Order.

Beginning on May 11, 1981 and ending on May 19, 1981, the non-jury trial of Phase I was held before this Court. Based upon a careful review of the contentions of the respective parties, the live and designated testimony, the numerous exhibits submitted into evidence and the record as a whole, the Court makes the following factual and legal determinations:

BACKGROUND:

A brief history of the relationship between these parties is pertinent to this Court's task of interpretation.

The Board of Public Utilities of the City of Springfield, Missouri, was and is an entity created and established under the statutes of Missouri and the Charter of the City of Springfield. Since 1953, the Board has done business through the entity known as City Utilities. Under the applicable statutes and charter City Utilities is charged with the control of electrical power production for the City of Springfield. City Utilities is authorized to purchase all necessary supplies and has the power to independently purchase and enter into contracts.

In the calendar year 1969, Purchaser first bought coal from Bill's Coal Company, approximately 38,000 tons. In 1970, in accordance with the competitive bid requirements of its charter, Purchaser sent out bid invitations to coal companies to furnish 245,000 tons of coal annually during the ten-year period from 1971 to 1981. Bill's Coal's bid was accepted and after negotiations, City Utilities and Bill's Coal entered into a long-term contract whereby Bill's Coal agreed to supply coal to City Utilities for ten years on a cost-plus basis. That agreement will hereafter be referred to as the "1970 Coal Contract".

Under the 1970 Coal Contract, Bill's Coal's costs of producing, mining and processing coal were determined and an agreed upon profit percentage (43%) was then added to the cost. The total figure was divided by the number of tons of coal sold under the agreement to arrive at a price per ton for the coal. Yearly adjustments were then made by the parties to compensate for underpayment or overpayment by City Utilities during the preceding year.

In 1974, the parties entered into an amendment of the 1970 Coal Contract, which amendment hereafter will be referred to as the "1974 Amendment". The purpose of the 1974 Amendment was to increase the yearly quantities of coal to be delivered to City Utilities. Under the terms of the 1974 Amendment, Bill's Coal was to develop a new mine at Fort Scott, Kansas (the Garland Mine). Shipments of coal would thereafter be made by rail from the Garland mine, thereby reducing transportation costs.

As a result of the 1974 Amendment, Bill's Coal made substantial investments in equipment and in the purchase of coal reserves. The Garland Mine was developed. Electronic scales, a railroad siding, a wash plant and other improvements were made in order to comply with the terms of the 1974 Amendment.

In the spring of 1976, at Seller's request, City Utilities agreed to assign the 1970 Coal Contract and the 1974 Amendment to Cherokee Coal Co. (a newly-formed partnership made up of the owners of Bill's Coal) which assignment would result in Cherokee owning all the reserves and the coal contract and Bill's Coal owning all the equipment and operating the mines. The assignment provided among other things, that City Utilities be granted options to extend the term of the 1970 Coal Contract and the 1974 Amendment to 1989 and 1995.

In connection with its expansion and development of the Garland Mine, Seller entered into a loan agreement with the Bank of Oklahoma in 1977. The Bank, after contacting Purchaser to ascertain the nature of the parties' relationship, agreed to loan Seller approximately $12,000,000.00. During that same year, 1977, City Utilities exercised its first option to renew the coal contract which extended the contract term from January 1, 1985 to December 31, 1989.

As noted previously, the 1970 Coal Contract was a cost-plus contract. Under that contract and the 1974 Amendment, Purchaser paid a fixed annual base for all coal. At the end of the calendar year, adjustments were made in the price based upon audited cost statements for Seller's costs and expenses incurred in the mining, handling and sale of coal to City Utilities. Seller provided the initial audit but Purchaser had the option of securing its own audit, if it so desired. The final year-end adjustment determined the base price per ton to be charged during the following calendar year.

In 1978, the parties and their respective auditors were unable to agree upon the proper amount of the year-end adjustment. Attempts to resolve the dispute were unsuccessful and in August of 1978, Purchaser filed an action

in the Federal Court, Western District of Missouri, seeking a declaration as to the propriety of certain cost and expense items it had disallowed for purposes of the adjustment. Seller soon responded by filing its own lawsuit in the same court. The relationship between the parties began to deteriorate. Purchaser raised the issue of the legality of the 1970 Coal Contract and the 1974 Amendment, indicating that their legal counsel had advised that the contract violated certain Missouri constitutional and statutory provisions. Purchaser withheld payment on money owed to Seller and stopped taking delivery of coal from Seller. In February of 1979, at the request of Seller, the Missouri court issued a preliminary injunction requiring Purchaser to perform under the contract. At that time, Purchaser also amended its declaratory judgment complaint to include the contention that the contract was invalid.

After the injunction was granted, shipments of coal were resumed by Seller and accepted by Purchaser. Coming due in the first part of April, 1979, was a substantial year-end adjustment to be paid by Purchaser to Seller, in an amount in excess of $2,000,000.00. Because this large payment was fast coming due, Purchaser filed in late March, 1979, a motion to dissolve the injunction or to increase the bond securing the injunction. A hearing was set for April 12, 1979.

It is also important to note the political climate in the City of Springfield at this time. There had been much newspaper attention given to the Coal Contract between Purchaser and Seller. There were complaints from the citizenry that Seller's price was too high and there was much discontent because of the rising prices of utilities. The Board of Public Utilities was under pressure to obtain price relief.

Seller was facing its own set of pressures. Seller was approxmiately $3,000,000.00 behind in payments to its general creditors and to the bank. In order to avoid an impending financial disaster, Seller desperately needed to receive and disburse the year-end adjustment of approximately 2.2 million dollars which was to be paid in early April, 1979.

THE AIRPORT MEETING:

Immediately after Bill Patch (the major stockholder of Seller) learned of Purchaser's motion to set aside the injunction or increase the bond, he anticipated that the 1978 adjustment would not be paid as expected. As a result, he initiated a telephone conversation with Mr. McMahan, manager of City Utilities, and set a meeting time and place to discuss settlement of the parties' disputes. The meeting occurred on March 29, 1979, at the airport in Springfield, Missouri.

In attendance at the meeting were Bill Patch, Lloyd Burkdoll (another partner and substantial stockholder of Seller), Mr. McMahan and two City Utilities board members, Del Caywood and Denton Smith. No attorneys attended. At that meeting, the parties settled the 1977 and 1978 year-end adjustment disputes and agreed to have the litigation ended. More importantly, Seller agreed to accept Purchaser's demand that the Contract be changed in several respects, including elimination of the cost-plus features of the 1970 and 1974 contract and an immediate reduction in the price per ton of coal.

THE DRAFTING OF THE 1979 AMENDMENT:

After the airport meeting, Mr. Patch contacted Mr. Lowry, attorney for Seller, to advise him of the settlement and renegotiation. Lowry was instructed to contact Mr. Kelly, litigation counsel for Seller and Mr. Fisher,

litigation counsel for Purchaser, to work out the details and prepare a draft agreement. Mr. Lowry completed a preliminary draft on April 3, 1979, incorporating the terms agreed upon by the principals at the airport meeting. The document took the form of an amendment to the 1970 Coal Contract. In preparing that draft, Mr. Lowry utilized the 1970 Coal Contract, the 1974 Amendment, and a written list of the items of settlement that had been conveyed to him by Mr. Patch by telephone on March 29, 1979.

On April 4, 1979, Mr. Lowry, one of his associates, and Mr. Patch went to Kansas City, Missouri, to review and rework the first draft with Mr. Kelly. On April 6, 1979, the reworked draft was hand-delivered to Mr. Fisher.

The hearing on Purchaser's Motion to Dissolve the injunction was still set for April 12, 1979. That morning the principals and their attorneys arrived at the federal courthouse in Springfield to either reach agreement on the terms of the proposed amendment or to present evidence on Purchaser's motion. After hearing a report on the settlement discussions, Judge Collinson allowed and encouraged the parties to attempt to reach an agreement that day. Time was allowed for that purpose.

During the course of that day, using the draft submitted to Mr. Fisher on April 6, 1979 as a working guide, the parties attempted to reach an agreement on all disputed points. The negotiations occurred in various witness rooms at the courthouse in Springfield and lasted virtually all day. In the late afternoon of April 12, 1979, the parties and their attorneys finally agreed on the exact language to be included in the proposed agreement. It was agreed that no further changes in the language would be made in light of the firm agreement between the parties that the new amendment would be partially performed that very day by the tender of a check by Purchaser to Seller

in an agreed amount in excess of 2.2 million dollars. That immediate partial performance by Purchaser was necessitated by the urgency of Seller's financial condition.

The Amendment was executed by all parties on April 17, 1979.

THE PRESENT LITIGATION:

The present litigation essentially involves disputed rights, liabilities, remedies and claims between the parties concerning the 1979 Amendment. Phase I, as mentioned previously is concerned solely with the proper interpretation of certain portions of the 1979 Agreement.

STANDARDS OF REVIEW

In Phase I the Court heard evidence relating to issues involving interpretation of the 1979 Amendment to the Coal Contract between the parties. The Court's task is now to interpret two paragraphs of the 1979 Amendment, specifically paragraph four dealing with coal quality specifications and paragraph five, the so-called "take-out" provision.

At the outset, the Court takes note of well-established rules and statutory law regarding the interpretation of contracts. The applicable standards are to be derived from Missouri law since the 1979 Amendment is a Missouri contract. Both parties are in agreement on this point. In this commercial transaction, the Missouri Uniform Commercial Code, 20A V.A.M.S. §§ 400.1-101 *et seq.*, necessarily plays an important part in this Court's task of interpretation.

The first question the Court must ask is whether or not the disputed contract language is ambiguous. Only if an ambiguity exists may the Court use extrinsic evidence which contradicts or varies the express terms of the agree-

ment. Such evidence would otherwise be barred by the parol evidence rule found in 20A V.A.M.S. § 400.2-202.

An ambiguity exists if the disputed language is reasonably susceptible of more than one construction. *Universal Towing Co. v. United Barge Co.*, 579 F.2d 1098, 1101 (Eighth Cir. 1978); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383, 386 (Eighth Cir. 1969). The existence of an ambiguity is a question of law for the Court. *Motor Carriers Council of St. Louis v. Local Union No. 600*, 486 F.2d 650, 653 (Eighth Cir. 1973). In determining whether an ambiguity exists, the Court should examine the disputed language in the context of the entire agreement. *Universal Towing Co. v. United Barge Co., supra.*

If the Court finds that an ambiguity exists, the meaning of the language is to be determined in the light of the evidence of the surrounding circumstances and the practical construction of the parties. *Fitch v. Doke*, 532 F.2d 115, 117 (Eighth Cir. 1976). The writing is to be read as a whole and interpreted in a way that will give effect to its general purpose. An interpretation which makes the contract reasonable will be preferred. *American Commercial Lines, Inc. v. Valley Line Co.*, 529 F.2d 921, 925 (Eighth Cir. 1976).

The ultimate goal is to ascertain the intent of the parties. Even under the Uniform Commercial Code, the intention of the parties is of paramount importance. *See Stewart-Decatur Security Systems, Inc. v. Von Weise Gear Co.*, 517 F.2d 1136, 1140 n. 11 (Eighth Cir. 1975); *U.S. Industries, Inc. v. Semco Manufacturing, Inc.*, 562 F.2d 1061, 1067 (Eighth Cir. 1977).

If the Court finds that there is no ambiguity, the Court should interpret the contract on its face as a matter of law. *Fitch v. Doke, supra.* Under the provisions of the

Missouri Uniform Commercial Code, the Court may use evidence of course of dealing, trade usage and course of performance to supplement or explain, but not to vary the express terms of an unambiguous agreement intended by the parties to be a full and final expression of their agreement. 20A V.A.M.S. §§ 400.1-205-2-208.

INTERPRETATION OF THE CONTRACT:

Paragraph 4:

The meaning of the certain language of Paragraph 4, as set forth below, has been one subject of dispute. That language states:

"Coal delivered pursuant hereto shall meet the following specifications:

Proximate Analysis (As Received)

Moisture	8.40%	Maximum
Ash	15.00%	Maximum
Sulfur	4.50%	Maximum
BTU	11,700	Minimum
Size	2" x 0"	

If the coal does not meet the above specifications, Purchaser shall give Seller written notice of the deficiency. Seller shall have thirty (30) days after receipt of said notice to correct the deficiency in the coal to be shipped in the future. Correction by the Seller of the deficiency specified in the notice shall terminate that particular notice, and any future deficiencies shall require a new notice; provided, however, coal below 11,000 BTU will be returned to Seller at Seller's expense unless the price per ton on such coal is negotiated to the satisfaction of the Purchaser."

The contentions of the parties with regard to the language are set forth in the Pretrial Order and are incorporated herein by reference.

The Court makes the following findings and conclusions with regard to the meaning of the language in question.

FINDINGS OF FACT:

1. The Court finds that the parties discussed the specifications for the quality of coal to be shipped under the 1979 Agreement at the airport meeting in Springfield, Missouri on March 29, 1979.

2. At that meeting, a tentative agreement was reached to allow both washed and raw coal to be shipped to Purchaser (previous contracts had not allowed raw coal), although the parties did not reach a final agreement as to the exact quality specifications which would be required.

3. Those "exact" specifications were established by the parties on April 12, 1979, during negotiation and formulation of the 1979 Agreement, most of those specification negotiations occurring in Mr. McMahan's office at City Utilities.

4. Although Seller's representatives expressed a desire to incorporate the concept of "averaging" of specifications over the course of a year (as had been done in previous contracts between the parties), the final language of paragraph four clearly provides that the coal must meet certain specified minimum or maximum quality parameters. This language is incompatible with the concept of "averaging" specifications.

5. Although paragraph four does not provide a time frame with reference to meting the quality specifications,

the Court finds that Seller's course of performance is to deliver coal to Purchaser on a shipment Basis. The parties' practice under the 1979 Amendment has been to pay for, sample and test the coal on a shipment by shipment Basis. Furthermore, all deficiency notices sent by Purchaser and all price adjustments made by Seller pursuant to the 1979 Amendment have occurred on a shipment basis.

CONCLUSIONS OF LAW:

1. The disputed language contained in paragraph four is not ambiguous.

2. The 1979 Amendment is an installment contract as contemplated by 20A V.A.M.S. § 400.2-612. The language of paragraph four requires that all coal delivered under the contract *shall meet* the five listed specifications.

3. Although paragraph four contains no time frame for reference, the parties' course of performance under the 1979 Amendment indicates that the quality specifications were and are to be met on a shipment by shipment basis.

4. Although this Court has concluded that the 1979 Amendment requires each shipment to meet the quality specifications, the Court further finds that the failure of one or more shipments to comply with all specifications does not necessarily constitute a material breach or a repudiation of the contract. Whether such failure to comply constitutes a breach of repudiation is an issue which is reserved for Phase II of these proceedings.

5. The Court finds the language "proximate analysis" is a term commonly used in coal sampling and testing and means, within the context of this contract, an analysis of the moisture, ash, sulfur and BTU content of the coal.

6. Used in conjunction with "proximate analysis" the term "as received" means that the coal must meet the re-

quired quality specifications at the time the coal is received by Purchaser at its power plant.

7. Pursuant to 20A V.A.M.S. § 400.1-203 and § 400.2-103(1)(b) all testing and sampling, in fact, all dealings and duties resulting from the 1979 Amendment must be performed in good faith, which requires both honesty and reasonableness. *See Bunge Corp. v. Recker*, 519 F.2d 449, 451-452 (Eighth Cir. 1975).

8. If the coal shipped by Seller does not meet the contract specifications, Purchaser is required to notify Seller by providing written notice of the specific deficiency.

9. Seller then has thirty (30) days after receipt of the notice to correct the deficiency in the coal to be shipped in the future.

10. If after receiving the notice of deficiency Seller begins shipping, within thirty (30) days, coal which complies with the specifications of the contract, then Seller has, in effect, corrected the deficiency.

11. If a future deficiency should occur, Purchaser must send a new notice and Seller will once again have thirty (30) days within which to correct the problem.

12. If Seller ships non-compliance coal for thirty (30) consecutive days, Purchaser has a right to terminate the contract.

13. This remedy of cancellation is in addition to all other remedies available to Purchaser under the Uniform Commercial Code. There is no evidence to establish that the remedy contained in paragraph four was to be an exclusive remedy. *See* 20A V.A.M.S. § 400.2-719(1)(b); *Ralston Purina Co. v. Hartford Accident & Indemnity Co.*, 540 F.2d 915, 919 (Eighth Cir. 1976).

Paragraph Five:

The parties are in dispute as to the proper interpretation of paragraph five, the so-called "take-out" provision. Paragraph five contains the following language:

> "Price—The price per ton for the fiscal year commencing April 1, 1979, is fixed at $23.00, less the depreciation credit referred to in paragraph 6 hereof. On or before the first day of January preceding each subsequent fiscal year, Seller shall notify Purchaser in writing of the price per ton to be charged and paid for the next succeeding fiscal year. After receiving such notice, Purchaser shall have until the following March 31st to publicly solicit bids on Purchaser's coal requirements covered by this agreement over the then remaining term thereof. If Purchaser can secure a bid for said remaining term for coal of equal quality and in like quantities from a coal producing company, with sufficient assets and adequate proven reserves to supply Purchaser's maximum coal requirements covered by the then remaining term of this agreement, supported by an independent geologist's report which substantiates the supplier's capability to perform, and who can provide a performance bond with good and sufficient surety in an amount not less than $3,000,000, to guarantee performance, at a delivered price of at least 25% less than the price quoted by Seller (adjusted to eliminate the depreciation credit referred to in paragraph 6 hereof, *infra*), Purchaser may by written notice cancel this agreement as of the end of the then current fiscal year. If Purchaser can obtain such a bid from such a coal producing supplier with the qualifications above referred to who will provide such coal to Purchaser at a delivered price of at least 15% less than the price

quoted by Seller (adjusted to eliminate the depreciation credit), Purchaser shall have the right, upon written notice to Seller prior to the end of the then current fiscal year, to cancel this agreement at the end of the next succeeding fiscal year. Prior to termination under this paragraph or expiration of this agreement, whichever shall first occur, the price per ton as established by Seller for each fiscal year in the manner above set out shall be binding on Purchaser and not be subject to adjustment by either party at any time, regardless of Seller's eventual cost, general market prices, or in any event. Purchaser shall, upon the request of Seller, provide Seller with the complete bid or proposal upon which Purchaser supports its notice to cancel pursuant to this paragraph, along with written evidence establishing that the bidder meets the qualifications referred to above."

The parties' contentions with regard to Paragraph five are set forth in the Pretrial Order and are incorporated herein by reference.

The Court makes the following findings and conclusions with regard to the meaning of Paragraph five.

FINDINGS OF FACT:

1. The Court finds that the 1970 Contract contained a "take-out" clause which explicitly required a comparison of Seller's price plus the cost of transportation to a competitor's price plus the cost of transportation. The words "delivered price'" were not specifically utilized in the take-out clause.

2. Under the terms of the 1970 take-out, even if Purchaser could find another supplier who met all the requirements, Seller had sixty (60) days to lower its price accordingly and keep the contract. (*See* Defendant's Exhibit #1, pages 9-10).

3. The 1974 Amendment contained a take-out clause virtually identical to the take-out in the 1970 Contract. (*See* Defendant's Exhibit #1, pages 22-23.).

4. The 1970 Amendment contained no such "last chance" to save the contract for Seller.

5. Mr. Lowry, attorney for Seller, testified that he referred to the 1970 Contract and the 1974 Amendment in drafting the 1979 Amendment. His intent in using the term "delivered price" was to shorten the verbiage of the earlier agreements but definitely to retain the cost of transportation in the price comparison.

6. Mr. Patch wanted a take-out clause which could not be easily effected. He wanted assurance that cheap coal, for example coal from Wyoming, would not be used to take his company out of the contract.

7. Seller had a substantial advantage over other coal producers in that its Garland mine was in close proximity to the Springfield market, resulting in much lower transportation costs for Seller's coal.

8. The take-out clause in the 1979 Agreement was very important to both parties.

9. The purpose of the clause was to provide Purchaser with a means of terminating its contractual relationship with Seller in the event Seller's price became too high. Purchaser wanted to assure itself of paying a fair market price for coal purchased under the contract.

10. Even before the final draft of the 1979 Agreement was executed, the attorneys for Seller recognized that the language of price comparison in the take-out was susceptible of more than one interpretation. On April 12, 1979, after negotiations had been completed, Seller's attorneys pointed out to Mr. Patch at Hamby's Restaurant

in Springfield that the language could be construed to mean F.O.B. the mine for Seller versus F.O.B. the mine plus the cost of transportation for a competitor. Mr. Patch did not agree. He thought the contract clearly read just as the parties had intended it to mean "delivered price versus delivered price."

11. No changes were made in the final draft to clear up the problem, if in fact it was a problem. Mr. Lowry testified the parties had sworn not to make any changes in the language in light of the fact that Purchaser had already partially performed by paying 2.2 million dollars to Seller on April 12, 1979.

12. Mr. Patch testified that when he signed the 1979 Agreement, he read it and thought that it accurately reflected his agreement with Mr. McMahan, that the price comparison for take-out purposes was delivered price versus delivered price, which included the cost of transportation.

13. The Court finds no evidence of any intention or agreement by the principals at the airport meeting in Springfield to eliminate the cost of transportation from the price comparison in the take-out clause. The settlement guidelines adopted by the principals at that meeting as evidenced in Mr. Lowry's notes taken from his phone conversation with Mr. Patch and Mr. McMahan's notes of the airport meeting show no indications of an intent to remove the cost of transportation from the price comparison.

14. A representative from the Bank of Oklahoma, Mr. Cragholm, was present during the April 12, 1979 negotiations at the courthouse. Mr. Cragholm had to approve the proposed amendment on behalf of the bank before Seller could execute the agreement. Mr. Cragholm

testified that he understood the price comparison for take-out purposes included the cost of transportation on both sides. The bank, he indicated, would not have given its approval if the price comparison had not included freight.

15. On December 28, 1979, in a meeting at Mr. McMahan's office in Springfield, Mr. Lowry and Mr. Hirlinger on behalf of Seller, took the position that the price comparison in the take-out clause of the 1979 Amendment was F.O.B. the mine for Seller versus F.O.B. the mine plus transportation for a competitor. Mr. McMahan vehemently disagreed, declaring that the comparison was to be "delivered price versus delivered price."

16. Mr. McMahan testified that since Purchaser always took delivery of coal at the Seller's mine, to Purchaser "delivered price" meant F.O.B. the mine.

17. Mr. Patch never accepted the "position" taken by Mr. Lowry and Mr. Hirlinger regarding the price comparison.

18. Under the circumstances of this case, it is unreasonable to believe that Seller would have entered into a coal contract which provided that an alternative supplier whose total cost to Purchaser might actually *exceed* Seller's cost would qualify to "take" Seller out of the contract.

19. The Court finds that it is not reasonable to believe that Purchaser would enter into a long-term contract for substantial quantities of coal with a company which did not have a present capability of providing substantial quantities of coal.

20. The Court further finds that it is unreasonable to believe that Purchaser would or could cancel the contract without having substantial written evidence that the selected bidder was qualified in all respects.

21. The Missouri statutes and Springfield's charter impose certain requirements for public bidding upon Purchaser. Purchaser has always been required to purchase its coal through competitive bidding in accordance with its rules and regulations.

22. At the time the 1979 Agreement was negotiated, Purchaser was concerned that the contract meet all statutory requirements. Purchaser used the public bidding aspect of paragraph five to satisfy the requirements for competitive public bidding.

23. Both Mr. Patch and Mr. Keene, a certified public accountant, testified that the depreciation credit contained in paragraph six of the 1979 Agreement was not supposed to be a factor in the price comparison contained in the take-out clause.

CONCLUSIONS OF LAW:

1. The Court finds that paragraph five is ambiguous in one respect. The following language is reasonably susceptible of more than one interpretation, taken in the context of the entire agreement:

> "at a delivered price of at least 25% [15%] less than the price quoted by Seller".

2. The remainder of Paragraph five is *not* ambiguous.

3. First dealing with the issue of price comparison, the Court finds ambiguity there because both the term "delivered price" and the term "price quoted by Seller" can be interpreted in at least two different plausible manners. "Delivered price" could mean either the price at delivery to Purchaser's power plants or the price at the point at which Purchaser takes delivery, i.e., where the risk of loss shifts.

As for the term "price quoted by Seller", that could be taken to refer to the price Seller quotes F.O.B. the mine. On the other hand, the Court finds that, in the context of paragraph five, the phrase can reasonably be interpreted to infer the *delivered* price quoted by Seller, particularly in light of the fact that this was to be a price comparison situation.

4. The Court finds nothing within the four corners of the 1979 Amendment which serves to clearly explain or establish what the parties intended for the price comparison to be.

5. Generally when a term is ambiguous, a Court finds help in interpreting that language by referring to the meaning the parties actually placed on the term under operation of the contract. Under the circumstances of this case, the Court finds no help in the practical interpretations espoused by the parties.

6. It is clear to this Court and is frankly admitted by Seller that as of December 28, 1979, Seller adopted an interpretation of the price comparison (F.O.B. the mine for Seller versus F.O.B. the mine plus transportation for a competitor) which was not the intention of the parties.

7. Purchaser's response was to declare that the comparison was delivered versus delivered" which, Purchaser contends the parties intended to mean F.O.B. the mine versus F.O.B. the mine.

8. The Court concludes that neither of these positions reflects the actual intention of the parties at the time the 1979 Agreement was drafted and executed.

9. The Court finds no convincing evidence that both parties acknowledged or agreed either at the airport meeting or on April 12, 1979 that an F.O.B. versus F.O.B. com-

parison was to be made under the take-out provision of the 1979 Agreement.

10. The Court recognizes that there is some evidence *after* Seller adopted its "position" which seems to indicate that the comparison should be F.O.B. the mine versus F.O.B. the mine. This evidence is, at best, circumstantial. The Court finds that other evidence, including the 1970 Contract, the 1974 Amendment, the circumstances surrounding the negotiation of the 1979 Amendment and the testimony regarding the trade usage of the term "delivered price" should be given controlling weight.

11. Based upon the clear evidence of prior course of dealings and the relationship between the parties, bearing in mind the realities of business and interpreting the price comparison in a reasonable manner, the Court concludes that the comparison was actually intended to be a reciprocal delivered price comparison, which includes the cost of transportation to Purchaser's power plants.

12. Since the Court finds no ambiguity in the remaining portions of paragraph five, the Court will interpret the language as a matter of law.

13. Seller is required to notify Purchaser in writing before January 1 of the price per ton to be charged for the next succeeding fiscal year.

14. Purchaser then has until March 31 to publicly solicit bids for Purchaser's coal requirements over the remaining term of the contract.

15. The language "publicly solicit bids" means to advertise and seek bids from the public at large.

16. Purchaser is required to carry on the bidding process in accordance with its established rules and regulations. Any actions or inactions by Purchaser inconsistent

with its rules and regulations would contravene the requirements of the contract.

17. By the very nature of public bidding, the solicitation of bids by Purchaser would have to be with an intent to award a contract to the selected bidder who qualified in all respects, in the event Purchaser chose to cancel its contract with Seller. To conclude otherwise would render the bid solicitation a sham process from the standpoint of Seller and the prospective bidders.

18. "Remaining term" means the number of years left under the contract.

19. The quality of coal to be supplied by an alternative coal producer should meet the contract specifications and the quantity must be 605,000 tons times the remaining fiscal years left in the agreement.

20. In order to qualify, a bid must be from a "coal producing company" which may be a partnership, joint venture or organization of individuals, so long as it is presently in the business of producing coal.

21. In order to qualify, a bidder must have the financial capability or resources to mine the coal in question and must either own or have under binding lease sufficient reserves to supply Purchaser's maximum coal requirements for the remaining term of the contract.

22. The existence of adequate reserves must be proven by the report of an "independent" geologist, one who is not an employee, agent or representative of the selected supplier or of Purchaser.

23. In order to qualify under the contract, a bidder must have the capability, if required, of obtaining a $3,000,000 performance bond.

24. The Court finds the language "(adjusted to eliminate the depreciation credit referred to in Paragraph 6

hereof)" means the effect of the credit (which operates to reduce the price paid by Purchaser) is eliminated, for purposes of the price comparison in the take-out.

25. The Court finds convincing testimony in the record by Mr. Patch and Mr. David Keene to support the conclusion that the depreciation credit was not to be a factor in the price comparison.

26. The language in the price comparison take-out provision does not contemplate what either Seller's price or a competitor's price will be for subsequent years.

27. The 25% and 15% provisions of the take-out clause are to be viewed as mutually exclusive. Only one can be effectuated at any given point in time.

28. The price set forth by Seller under paragraph five is to remain firm for a 12-month period and may not be altered by either party.

29. After providing written notice, Purchaser may cancel the agreement at the end of the then current fiscal year if Purchaser has obtained a bid which meets all the requirements of the 25% take-out.

30. The 15% take-cut is essentially the same as the 25% cancellation provision with the exception that the right to cancel accrues at the end of the next succeeding fiscal year (as opposed to the then current fiscal year).

31. If Purchaser elects to cancel the contract, Seller is entitled to request and receive the written evidence upon which City Utilities relied so that Seller can verify that Purchaser did in fact rightfully cancel.

32. The obvious purpose of the requirement is to demonstrate to Seller that the right to terminate is being lawfully exercised by Purchaser.

33. The cancellation notice required under the take-out clause requires Purchaser to identify the chosen bidder.

34. The right to cancel was not conferred upon Purchaser for the sole purpose of cancelling the agreement without entering into a contract with the alternate supplier.

Having fully resolved the interpretation issues in Phase I, the Court deems it necessary and appropriate to set Phase II for non-jury trial on October 5, 1981, at 9:30 a.m., in order to resolve the remaining issues in this litigation as expeditiously as possible. A final pretrial conference for Phase II will be held on September 17, 1981, at 1:00 p.m.

In Phase II, the Court desires to hear the full story surrounding the many breach and repudiation issues raised by the parties. Only after hearing all the evidence will the Court deal with the repudiation issue raised and briefed by the parties in Phase I.

It is so Ordered this 2nd day of September, 1981.

/s/ James O. Ellison
James O. Ellison
United States District Judge

APPENDIX E

(Filed January 29, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

Consolidated Civil Action
No. 80-C-187-E and 80-C-580-E

BILL'S COAL COMPANY, INC., et al.,
Plaintiffs,

vs.

BOARD OF PUBLIC UTILITIES OF THE CITY OF
SPRINGFIELD, MISSOURI, et al.,
Defendants.

CITY OF SPRINGFIELD, MISSOURI,
Plaintiff and counter-defendant,

and

BOARD OF PUBLIC UTILITIES OF THE CITY
OF SPRINGFIELD, MISSOURI,
Counter-defendant,

vs.

BILL'S COAL COMPANY, INC., et al.,
Defendants and Counterclaimants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of this consolidated proceeding, which centers around a coal contract (the 1979 Amendment) between the parties has previously been divided into three separate phases. After nonjury trial, the Court on September 2, 1981, entered its Findings of Fact and Conclusions of Law

on Phase I (Phase I Findings and Conclusions) interpreting certain provisions of the 1979 Amendment.

Phase II of this litigation focuses upon the many breach and repudiation issues raised by both parties. The nonjury trial of Phase II was held before this Court from November 2, 1981 through November 4, 1981. Based upon a careful review of the contentions of the respective parties, the live and designated testimony, the numerous exhibits submitted into evidence and the record as a whole, the Court makes the following factual and legal determinations.

Background

A brief history of the relationship between the parties, up to and including the drafting of the 1979 Amendment, is contained in the Court's Phase I Findings and Conclusions. The Court hereby incorporates by reference that history. The Court deems it necessary to supplement this background information, however, and to detail subsequent events so that the breach and repudiation issues to be addressed here by the Court will appear in their proper perspective.

In the late summer or early fall of 1978, Mr. Richard Crites, who earlier that year had become in-house counsel for Purchaser, voiced some concern over the legality of the 1974 Amendment to the 1970 contract. Mr. Crites was of the opinion that the cost-plus feature of the 1974 Amendment violated Missouri statutes requiring a firm or fixed price for such contracts. Crites also thought that the 1974 Amendment violated public bidding requirements of the Missouri statutes and the Springfield City Charter. At a meeting held in Tulsa, Oklahoma in the fall of 1978

At the completion of this overview, the Court will enter its specific findings of fact and conclusions of law on the issues raised by the parties.

I.

PROCUREMENT OF THE 1979 AMENDMENT

discuss year-end adjustments, Mr. Crites, for the first time, told Seller's representatives that there was a possibility that the 1974 Amendment was illegal.

In January of 1979, Mr. Crites advised the members of City Utilities' board at a board meeting that there were potential problems with the 1974 Amendment. He told them of his concerns on the illegality issue. Mr. Crites also advised the Board that, if the contract was in fact illegal, the board members might be subject to personal liability for payments made under an invalid contract. Mr. McMahan, manager of City Utilities, then contacted Mr. Lowry, attorney for Seller, and advised him that the question of the validity of the 1974 Amendment would have to be resolved before the year-end adjustment dispute then in litigation could be settled. Both Mr. Lowry's firm and Seller's other attorneys, the Gage & Tucker law firm, provided Mr. Crites and Mr. McMahan with legal authorities on the illegality issue.

In addition, Purchaser sought a "second opinion" in the form of legal advice from a local law firm, Woolsey, Fisher, et al., on the illegality issue. The Fisher firm, which has represented Purchaser throughout this litigation, filed amended pleadings in January of 1979 in the parties' year-end adjustment litigation raising the illegality issue before the Honorable William R. Collinson in the United States District Court for the Western District of Missouri, Southern Division, Consolidated Nos. 78-3231-CV-S and 78-3235-CV-S. (See Phase I Findings and Conclusions, page 4).

As the Court noted in the Phase I Findings and Conclusions, after the Purchaser raised the illegality issue in

Court, it stopped taking delivery of coal from Seller. Seller then sought an injunction which Judge Collinson granted, ordering Purchaser to perform under the 1974 contract. When settlement of the year-end dispute was finally tentatively reached at the airport meeting (See Phase I Findings and Conclusions, page 5) Purchaser was accepting and paying for coal.

The Court has previously noted that both parties were under pressure at the time of the airport meeting. Seller wanted the matter settled as quickly as possible so that it could be paid the $2,000,000 which was soon to become due. Purchaser and the individual Board members on the other hand wanted a settlement and a finding that the contract was legal and valid prior to making that $2,000,000 payment.

In addition, Purchaser was under pressure to seek a price reduction for the coal it purchased from Seller. Another coal company, Fuel Dynamics, was willing to sell coal to Purchaser for $22.00 per ton, whereas Seller's adjusted price was $28.05 per ton (See Plaintiff's exhibit 135).

The evidence is clear that Purchaser sought a price reduction in view of the disparity between the Fuel Dynamics' price and the Seller's price.

The 1974 Contract contained a "takeout provision" which would allow Purchaser to cancel the Contract if the price from Seller exceeded 125% of the cost of coal from another supplier, but also provided the Seller with an opportunity to lower its price to avoid the "takeout". It is clear that the Seller agreed to reduce its price to $23.00 per ton as a result of its concern over the Fuel Dynamics' price and the takeout provision of the 1974 contract.

In return, Purchaser agreed to allow the Seller to ship either washed or raw coal, thereby reducing the cost of production for the Seller.

The parties reached a tentative agreement to amend the contract at the airport meeting. After that, it was simply a matter of getting the agreement into the proper form. The 1979 Amendment itself, which was finally formulated by the parties and their attorneys at the Springfield courthouse on April 12, 1979 (See Phase I Findings and Conclusions, page 6), was subject, as a condition precedent, to a declaration by the Missouri Federal Court in Consolidated case Nos. 78-3231-CV-S and 78-3235-CV-S that the 1970 contract as amended (both in 1974 and 1979) was legal and valid. Judge Collinson made such a finding in his Order of April 20, 1979.

II.

PERFORMANCE UNDER THE 1979 AMENDMENT (PRE-LITIGATION)

As this Court has previously noted (See Phase I Findings and Conclusions, page 9), under the terms of the 1979 Amendment, Seller was allowed to ship Purchaser a mixture of washed and unwashed coal. This came about because Mr. Patch would not agree to reduce the price of his coal unless he could reduce his production costs by including raw (unwashed) coal in future shipments. Raw coal is cheaper to produce, but it is generally lower in quality and more variable than washed coal. Accordingly, the quality specifications of the 1979 Amendment differed somewhat from the quality specifications of the 1970 contract as amended in 1974 (See Phase I Findings and Conclusions, pages 9 - 11).

The 1979 Amendment established minimum and maximum specifications which the coal had to meet, including a minimum BTU of 11,700. The Amendment provided that if the coal was deficient in any respect, Purchaser would send a notice of deficiency to Seller, who could then

"correct" the deficiency by shipping complying coal within 30 days. If a coal shipment fell below 11,000 BTU's Purchaser was entitled to either ask for and receive a price reduction or to return the coal.

Immediately after the 1979 Amendment was executed, Mr. Hirlinger advised his mine superintendents in writing of the changes that resulted from the new agreement. He stated that Seller would be shipping a mixture of raw and washed coal and that if the coal failed to meet the new specifications, Purchaser would give him written notice of the deficiency and the mine would have 30 days to correct it by sending a complying shipment. Hirlinger's memo was received by Marion Webster, superintendent of the Garland mine and the person responsible for day-to-day performance under the 1979 Amendment.

Seller maintained two storage piles of coal at the Garland mine, one all washed and one all raw. Seller loaded coal from these two piles into 100-ton railroad cars to be shipped to Purchaser. Seller used large front-end loading machines to secure buckets of coal from each pile. These "buckets" were then placed en masse into the railroad cars. It was part of Mr. Webster's job to determine the ratio of washed to raw buckets of coal to place in the coal cars. He experimented on a trial-and-error basis in arriving at an appropriate formula to meet the contract specifications.

Seller customarily shipped coal to Purchaser in unit trains consisting of thirty-one separate cars, each of which contained 100 tons of coal. Purchaser received the coal at its Southwest Power Station, which is located southwest of Springfield, and at its James River Power Plant, which is located southeast of Springfield. As the coal arrived, Purchaser unloaded it one railcar at a time. The car was placed over an underground unloading hopper where Pur-

chaser's employees opened the hopper doors of the train car. The coal then cascaded from the car into the underground hopper and out onto a moving belt where it would then be taken either directly into the plant or else stockpiled. In either case, the coal was intermingled with previous shipments.

Subsequent to the execution of the 1979 Amendment, both Purchaser and Seller began sampling and testing coal on a shipment-by-shipment basis in order to monitor quality and compliance with the contract specifications. Seller began sampling train shipments in April, 1979. All sampling was initially done by James Pruitt, an employee of Seller. Mr. Webster instructed Pruitt to secure a sample from the coal in the cars waiting to be shipped so as to duplicate the blend of raw and washed coal contained in the cars. Pruitt obtained the samples by using a shovel to take a certain proportion of raw and washed coal from six to ten cars in each shipment. This gross sample of approximately 50-60 pounds was then secured, identified and delivered to Luman's Laboratories in Chetopa, Kansas for preparation and analysis. Seller did not receive the test results until two or three days after each thirty-one car unit train left the mine. In the summer of 1979, Larry Snow took over Pruitt's sampling job. Snow continued to sample in the same manner.

When train shipments began under the 1979 Amendment, Purchaser sampled and tested nearly every train. All its sampling, sample preparation and testing was conducted by its own personnel. Purchaser had recently set up a central laboratory under the direction and supervision of Dr. John T. Witherspoon.

Sampling, sample preparation and testing were performed by different employees of Purchaser. Members of the maintenance crews who unloaded the trains obtained

the gross samples. Despite some differences in sampling techniques, the basic procedure at the Southwest plant and the James River plant was the same. A member of the maintenance crew would use a small shovel or scoop to "catch" coal as it cascaded from the bottom of the railcars after the hopper doors of the railcar had been opened. The crewmen inserted the tool 6 to 8 inches into the stream of coal coming from the cars. Samples were always taken from only one side of the cars. Generally, each railcar in each shipment was sampled.

At the Southwest plant, the crewmen took one shovel or scoop from each car, resulting in a gross sample of about 60 pounds. At the James River plant, the crewmen attempted to take one-third of a scoop of coal from underneath each of three hopper openings on each train car. The James River gross sample also weighed approximately 60 pounds. These gross samples were bagged and dated. Another employee would then normally mix each gross sample and divide the gross sample to obtain a small sample of 5 or 6 pounds to be delivered to Purchaser's central laboratory for testing.

In April of 1979 after the 1979 Amendment was finalized, Mr. Hirlinger wrote to Mr. McMahan requesting that Purchaser provide Seller with a copy of Purchaser's coal analyses. McMahan directed Mr. Louis Rumsey, who was responsible for day-to-day administration of the contract, to transmit these analyses to Mr. Hirlinger. Mr. Rumsey sent the first analyses on April 27, 1979.

On May 4, 1979 Seller received from Mr. Rumsey the first decifiency notice under the 1979 Amendment. That notice set forth a deficiency in the BTU and ash specifications based upon Purchaser's laboratory analysis. Upon receipt of the deficiency notice, Mr. Hirlinger immediately informed Mr. Webster and directed him to bring the

specifications up and determine what had caused the deficiency. Mr. Webster sought to determine if the coal had been loaded cleanly, if the wash plant had been operating properly or if the formula (raw to washed ratio) needed adjustment. This same procedure was followed by Mr. Hirlinger and Mr. Webster when they received later deficiency notices.

Purchaser again sent a notice of deficiency on May 18, 1979. Mr. Hirlinger wrote to Mr. McMahan later that month regarding the discrepancy in the parties' analysis of the coal. Hirlinger suggested that the parties engage an independent laboratory to sample and test the coal. Seller received additional deficiency notices in June and July. In a letter to Mr. McMahan dated July 19, 1979, Mr. Hirlinger again expressed his concern about the discrepancies in Purchaser's and Seller's coal analyses. Hirlinger again suggested engaging an independent laboratory for sampling and testing the coal.

More deficiency notices were received in August of 1979. In addition, on August 15, 1979 Mr. Rumsey notified Mr. Hirlinger that Purchaser wanted a price adjustment on shipments of coal below 11,000 BTU. Mr. Hirlinger responded on August 17, 1979 suggesting the appropriate formula for adjustment, which was thereafter used to penalize Seller for shipments of coal which fell below 11,000 BTU. All BTU adjustments were based on Purchaser's test results.

Sometime in August, 1979, Mr. McMahan had a personal meeting in Springfield with Mr. Hirlinger and Mr. Patch. The three discussed the quality of coal shipped by Seller. Mr. McMahan expressed his dissatisfaction with Seller's performance. Mr. Patch and Mr. Hirlinger assured Mr. McMahan that they could and would meet the contract specifications. Despite these assurances, Purchaser con-

tinued to find quality deficiencies in the coal it received from Seller. Purchaser sent deficiency notices in November and December of 1979.

Sometime in the late fall of 1979, Purchaser decided it would go out for bids in January of 1980 after it received Seller's 1980 price, pursuant to the provisions contained in paragraph 5 of the 1979 Amendment. Specifications for the solicitation of coal bids were submitted for Board approval on November 29, 1979. At that meeting, the Board approved the bid specifications and directed that they be issued on January 1, 1980. The Board discussed whether or not to disclose Seller's price prior to the closing of bids. After the discussion, the Board directed that the bid specifications not include Seller's price but that the percentages required to take Seller out of the contract be included. Shortly thereafter, Mr. Hirlinger became concerned when he learned by reading the Springfield newspaper that the Board had already determined to bid the coal contract in 1980. He was also concerned that the Board considered publishing Seller's 1980 price. Mr. Hirlinger notified Mr. McMahan of his concerns.

Mr. Hirlinger also contacted Mr. Lowry. Mr. Lowry discussed the situation with Mr. Turner White, who was the new in-house counsel for Purchaser. Mr. White explained to Mr. Lowry that he had advised Purchaser that Seller's price to be submitted for the upcoming year was public information. Lowry and White also discussed the wording of the bid specifications. Mr. White advised Mr. Lowry that he was somewhat "new" to the contract and had not exactly decided how to interpret the requirements of paragraph 5. Mr. Lowry suggested to Mr. White that it might be a good idea for Seller to review the bid specifications and to have some input into their formulation.

On December 10, 1979, Mr. Lowry wrote Mr. White a letter confirming the substance of their telephone conversation. In a blind postscript to that same letter (Plaintiff's exhibit 36) sent to Mr. Hirlinger, Mr. Patch, Floyd Burkdoll and Charles Veskerna, Mr. Lowry reminded Seller of "the plan" Seller was preparing in regard to the upcoming bid solicitation by Purchaser. The "plan" was to demand and require that Purchaser compare Seller's F.O.B. mine price to a competitor's price including transportation to the City of Springfield in order to terminate the contract under the "take out" clause.

Mr. Lowry also made the following comment in his postscript:

> Sometime before the end of December you must all agree on the price that will be submitted to City Utilities. This price submission must be done on or before the first day of January. Our price as furnished to them will be public information and I feel that we are kidding ourselves if we think that our competition will not be aware of our bid price prior to the time that they submit their competitive bids as requested by City Utilities.

Later that month, Seller held a Board meeting to establish its 1980 price for coal. That meeting was attended by Mr. Patch, Mrs. Patch, Mr. Veskerna and Mr. Cragholm. Mr. Jim Burkdoll and Mr. Lloyd Burkdoll, also principals of Seller, were consulted by phone to establish the price to be quoted to Purchaser. The principals adopted the plan to require Purchaser to compare Seller's F.O.B. mine price to a competitor's price plus transportation for take-out purposes.

Shortly after the Board meeting, Mr. Lowry and Mr. Hirlinger prepared a preliminary draft of a letter to Pur-

chaser espousing "the plan". The final draft, written on December 27, 1979, was hand-delivered to Mr. McMahan in Springfield on December 28, 1979. (Plaintiff's exhibit 39). (See Phase I Findings and Conclusions, page 15). The stated purpose of that letter was to advise Purchaser of Seller's price for the upcoming year. The letter also informed Purchaser that in applying the take-out clause it would have to compare Seller's F.O.B. mine price (less the depreciation credit) to a competitor's price plus the cost of transporting the coal to Springfield. In addition, Mr. Lowry and Mr. Hirlinger verbally explained to Mr. McMahan Seller's position on the price comparison for take-out purposes. Mr. McMahan vehemently disagreed. He informed Seller's representatives that he would "see them in Court" if they insisted upon that interpretation.

In an open meeting of the Board of City Utilities held on January 3, 1980, Mr. McMahan advised the Board of Seller's 1980 coal price. The Board then unanimously authorized management to release the coal bid specifications on January 4, 1980, declaring that any prospective bidder requesting Seller's coal price should be provided the same. The bid invitations and specifications were mailed on January 4, 1980 to a large group of coal companies. Seven responses were eventually received before the bid closing date of February 11, 1980.

On the date the bids were opened, Mr. McMahan appointed a committee to evaluate the bid responses. Purchaser advised the committee to compare Seller's price F.O.B. the mine to a competitor's price F.O.B. the mine. That committee issued its report on March 13, 1980, setting forth alternative recommendations, including a rebid. On that same date, the Board conducted a meeting, ultimately instructing management to rebid as expeditiously as possible.

A second bid invitation was issued on March 14, 1980, setting a closing date of March 21, 1980. Several responses were received and evaluated by the committee, which issued its report on March 27, 1980. The committee recommended that Purchaser immediately cancel its contract with Seller based upon bids submitted by Nemo Coal and Man-Mac Fuel, which the committee felt qualified under the 25% and 15% price comparison in paragraph 5 of the 1979 Amendment. Later that day the Board of City Utilities met and approved the committee's recommendation to cancel the contract.

III.

PROCEDURAL HISTORY OF THIS LITIGATION

On March 27, 1980, Purchaser notified Seller that it was cancelling the coal contract because it had obtained bids which Purchaser felt qualified under paragraph 5 of the 1979 Amendment to "take" Seller out of the contract. Immediately afterwards, on March 28, 1980, Purchaser filed a declaratory judgment action in the United States District Court for the Western District of Missouri, Southern Division, Case No. 80-3090-CV-S seeking a declaration of the rights and liabilities of the parties and an interpretation of the contract.

Seller responded by filing its own action on April 8, 1980, in this Court alleging breach of contract by Purchaser, seeking specific performance of the coal contract or, in the alternative, damages. Seller also sought a preliminary injunction to obligate Purchaser to perform under the terms of the 1979 Amendment pending the resolution of the litigation. A hearing was held before the Court on April 17, 1980 and on April 18, 1980 the Court entered an Order granting Seller's motion for a preliminary injunction. That injunction, which is still in effect, directed Purchaser to

accept and pay for coal from Seller and to comply with the terms and conditions of the 1979 Amendment until such time as a decision on the merits could be reached in the case.

Upon Purchaser's motion filed pursuant to 28 U.S.C. § 1404(a), the Court on May 19, 1980, transferred Seller's case to the Western District of Missouri, where Purchaser's declaratory judgment action was pending before Judge Collinson. On June 29, 1980, Judge Collinson entered an Order of recusal and the then-consolidated action was assigned to the Honorable Scott O. Wright. At that point Seller moved to retransfer the case back to the Northern District of Oklahoma. Judge Wright entered an Order of transfer on September 29, 1980.

After initial skirmishes and a transfer or two, the case landed before this Court for trial.

IV.

POST-LITIGATION PERFORMANCE

Although the parties were performing the contract, in accordance with this Court's Order, the quality of coal shipped by Seller continued to be an issue. By June 6, 1980, Purchaser was sending deficiency notices to Seller. Deficiency notices and notices of BTU adjustments continued throughout 1980. Purchaser continued to rely upon its own test results in evaluating the quality of coal received from Seller.

In July of 1980, Mr. McMahan instructed his counsel to terminate the contract based upon what Purchaser perceived as Seller's persistent failure to ship coal which met the contract specifications. Purchaser's attorneys gave such termination notice to Seller's attorneys by letter dated July 15, 1980; however, Purchaser continued to accept coal,

send deficiency notices and otherwise perform the contract pursuant to the injunction.

In August, 1980, Seller ceased doing its own sampling. Instead it employed Standard Laboratories to secure coal samples as the coal was unloaded at Purchaser's power plants and to perform test analyses on those samples. Seller also employed Luman's Laboratories, who was already testing Purchaser's coal samples, to secure samples at the Garland mine.

Standard Laboratories, the second largest independent coal testing company in the country, began sampling at Purchaser's power plants on August 12, 1980. Standard's employee, Mr. William Mayer, wanted to obtain samples by the full stream-stopped belt method, but was unable to do so because of Purchaser's safety concerns due to the high speed of the belts. Mr. Mayer therefore implemented a partial stream-cut sample method from moving belts. Mr. Mayer or his employees took 75 or 76 separate increments of coal from the belt with a special shovel. Each increment, which weighed approximately 6 pounds, was paced systematically over the entire unloading process of the train shipment.

The gross sample, which was in the range of 400 to 500 pounds, was identified then transported to Mr. Mayer's laboratory for preparation and analysis. Each sample was first crushed, then divided and blended by repeated mechanical riffling, resulting in a laboratory sample of approximately 3 pounds. That sample was then tested and analyzed. Standard Laboratories sampled and tested every train unloaded at Purchaser's power plant from August 12, 1980 until December 10, 1980.

Luman's Laboratories began its sampling at the Garland mine on September 17, 1980. Mr. Carol Luman, owner

and operator of the laboratory, selected a sampling method which consisted of taking a sample increment with a shovel every time the front-end loader took a scoop from either coal storage pile for loading into the rail cars. Luman or his employee took the sample from the "cut" in the pile where the loader operator had taken his coal. The number of increments in the sample equalled the number of loader buckets in the train load of coal.

Luman's gross sample weighed approximately 1,200 pounds. It was mechanically divided with a riffler to 500 to 700 pounds. This sample was taken to Luman's Laboratory, crushed, then divided and mixed with rifflers until a final sample for testing purposes was obtained. Luman has continued his sampling and testing of Seller's coal.

In October, 1980, Purchaser altered its sampling techniques. The number of samples per car at the Southwest Plant was increased from 1 to 5, then reduced to 3. The size of the gross sample was raised to approximately 400 pounds per train. In addition, Purchaser obtained a mechanical riffler for each power plant to use in dividing the gross samples. Purchaser's gross samples were never crushed before division. Eventually the gross sample size at the James River Plant was also increased.

To the current date, performance has continued under the 1979 Amendment pursuant to this Court's injunction. This lawsuit gave birth to another lawsuit before this Court, 81-C-127, when Purchaser attempted to cancel the contract on March 30, 1981, after obtaining bidders which it contended "beat" Seller's 1981 price by the requisite margin. Seller filed the 81-C-127 lawsuit on March 31, 1981, and obtained an injunction on April 9, 1981, after a hearing before the Court on April 6, 1981. That injunction, virtually identical to the injunction in this case requires both parties to perform according to the terms of the 1979 Amendment.

Having made the above Findings of Fact in narrative form, the Court will now address the issues raised by the parties, entering additional specific findings of fact and the Court's conclusions of law.

V.

SELLER'S "ILLEGALITY AND DURESS" CLAIMS AND/OR DEFENSES

1. Seller produced certain evidence at trial (Defendant's exhibit # 85) which showed that as early as August of 1974, before the ratification of the 1974 Amendment, counsel for the Board, Mr. John Carr, had expressed concern to Mr. Bob Hogan, who was then manager of City Utilities, about the legality of the form of the parties' contractual relationship.

2. There is no evidence, however, that this illegality issue was seriously considered by Purchaser until late 1978 when Mr. Crites became aware of the Carr-Hogan correspondence on the subject.

3. Although the Board was reluctant to challenge the legality of the coal contract (Caywood deposition, page 63), Purchaser raised the legality issue in the year-end adjustment litigation because of a genuine concern about the validity of the contract. Purchaser and the Board needed to resolve the issue, especially in light of Mr. Crites' advice that the Board members might be personally liable for payments made under an invalid contract.

4. Even though in his April 20, 1979 Order Judge Collinson characterized as "frivolous" Purchaser's allegations that the contract was illegal because of statutory violations, the Court finds that these allegations were made by Purchaser in good faith for the specific purpose of resolving the illegality issue.

5. The Court finds that even Mr. Lowry acknowledged that he thought Richard Crites was acting in good faith as a lawyer when Crites raised the issue (Lowry deposition, page 123). Mr. Lowry felt Crites' advice placed the City Utilities Board in a position of "having to litigate something that maybe they weren't wanting to litigate." (Lowry deposition, page 124).

6. There was no testimony that Purchaser utilized the illegality issue at the airport meeting to achieve a price reduction from Seller.

7. No allegation or claim of coercion was asserted in the 1979 litigation. Mr. Patch never sought his attorneys' advice with respect to relief from the 1979 Amendment upon the basis of having been coerced into signing the Agreement until after the 1980 litigation was already in progress.

8. Despite Seller's assertion that it was coerced into executing the 1979 Agreement, Seller has repeatedly sought specific performance of the 1979 Agreement.

9. There is evidence that Seller lost money in 1980 after converting to the 1979 fixed price agreement. The evidence is clear, however, that Seller expected to make money or at least break even on the 1979 Agreement. (Patch deposition, page 86; pages 169-170).

10. The Court finds that at the time Mr. Patch reduced the price of his coal, Seller was concerned that Fuel Dynamics might try to take Seller out of the 1974 Contract. Seller was concerned about the low price level Fuel Dynamics was proposing to Purchaser. (Hirlinger deposition, page 531) (Patch deposition, pages 171-172).

11. The Court finds that any economic coercion felt by Seller was not the fault of Purchaser.

CONCLUSIONS OF LAW

1. At the outset, the Court recalls and the record reflects that the Court has previously ruled that any claims arising prior to April 20, 1979, are precluded by Judge Collinson's Order entered April 20, 1979, which held that the 1970 Contract, as amended (including the 1979 Amendment) was valid and binding on the parties.

2. Accordingly, Seller's assertions that Purchaser used economic duress and the threat of illegality to coerce Seller into making the 1979 Amendment cannot be raised as claims, but only as defenses. (See Pretrial Hearing Tr., Sept. 17, 1981, pages 52 *et seq.*).

3. This distinction is of no significance, however, since the Court concludes Purchaser did not in any manner "coerce" Seller. The Court finds that neither party is guilty of any actionable misconduct in seeking or obtaining the 1979 Amendment.

4. The Court concludes that Purchaser acted in good faith in raising the illegality issue. Seller cannot use Purchaser's conduct in this regard as a defense to any contractual breaches Seller may have committed.

VI.

PURCHASER'S BAD FAITH/REPUDIATION CLAIMS

1. The Court has previously described how Seller discovered or decided that the language in paragraph 5 could be construed to require Purchaser for take-out purposes to compare Seller's F.O.B. mine price to a competitor's F.O.B. mine price plus transportation to Springfield. The Court also found that Seller adopted and demanded this construction on December 28, 1979 during a meeting with Mr. McMahan.

2. It does not appear that Seller consciously planned in April of 1979 to use this "interpretation" at some later date to further its own gains. The Court does not know when "the plan" was first conceived. It is apparent, however, that by December 10, 1979, Seller was utilizing that plan.

3. The purpose of making the demand was to put the coal company in a more favorable position. (Lowry deposition, pages 446, 457).

4. Although there is some testimony that Seller adopted its "plan" for use as a negotiating tool, Seller's later actions are inconsistent with such a contention. The Court finds no excuse or justification for Seller's December 28, 1979 demand upon Purchaser. Seller knew and in fact admits that it has always known the intended meaning of the price comparison in the take-out clause. The Court further finds that Seller knew that it was not entitled to the price comparison upon which it was insisting.

5. Seller made it clear in its December 28, 1979 conference with Purchaser that Seller would not recognize Purchaser's right to cancel the contract under paragraph 5, unless Purchaser could obtain a qualified bid, including transportation, which was 15% or 25% less than Seller's F.O.B. mine price. Purchaser refused to accede to this demand. Purchaser instead chose to use an F.O.B. mine price comparison for the take-out, cancel the contract and then to submit the matter to the Court for an interpretation of the contract.

6. Under the take-out clause, Seller was required to put its delivery price "on the line" against the delivered price of any qualified producer who might bid the contract. Seller had a distinct advantage in this comparison since, under the terms of paragraph 5, nobody could "take"

Seller out of the contract unless they could beat Seller's price by a 15% or 25% margin. As the Court found in its Phase I findings and conclusions, this delivered price comparson included the cost of transportation. (Phase I Findings and Conclusions, pages 16-17).

7. If Seller had been successful in requiring Purchaser to use the price comparison demanded by Seller, it would have been virtually impossible for any qualified bidder to take Seller out of the contract. Seller's "plan" gave Seller even more latitude in setting its contractual price than the contract itself already provided.

8. The continuation of the Seller's plan is evidenced by Seller's Second Amended Complaint, filed July 16, 1980 and Seller's Third Amended Complaint, filed September 5, 1980. Both amended complaints assert that the take-out clause in the 1979 Amendment required Purchaser to compare Seller's F.O.B. mine price to a competitor's price plus transportation.

9. When Mr. Hirlinger was deposed in December of 1980, he continued to assert on behalf of Seller that the take-out comparison was intended to be Seller's price F.O.B. the mine versus a competitor's F.O.B. mine price including transportation (Hirlinger deposition, pages 334-335).

10. At the trial of Phase I, the Court's initial impression, based upon testimony heard by the Court, was that Seller's assertion of "the plan" was not in good faith. The Court's comments in the record reflect that impression. (Tr. May 12, 1981, pages 173-174). The Court has now heard and received all the evidence on the breach and repudiation issues in this case. There can be no doubt that Seller failed to act in good faith in this respect.

11. Seller maintained its position regarding the take-out price comparison until the first Pretrial Order was

filed on April 28, 1981. Seller had decided that it "was not a tenable position" to continue to maintain. (Lowry deposition, page 510). The Court has voiced its concern over Seller's assertion of a position which it knew to be inapposite to the intention of the contracting parties. It is this Court's task to now assess the legal effect of Seller's actions.

CONCLUSIONS OF LAW

1. Seller suggests that it has asked nothing more from Purchaser than Purchaser's compliance with the termination provisions of the 1979 Amendment. According to Seller, the "subjective bases" for Seller's demand is of no consequence. Seller argues that if a party has a right under a contract, the assertion of that right can never be a condition "beyond" the terms of the contract.

The Court recognizes that often, the extent of a parties' rights under a contract may be hotly disputed. If a party, acting honestly and in good faith, asserts a right or offers to perform in accordance with his erroneous interpretation of the contract, there is no legal basis for alleging that he has repudiated the contract. *Lowenstein v. Federal Rubber Co.*, 85 F.2d 129, 131 (Eighth Cir. 1936); *Kimel v. Missouri State Life Insurance Co.*, 71 F.2d 921, 923 (Tenth Cir. 1934); *Walker v. Shasta Minerals and Chemical Co.*, 352 F.2d 634, 638 (Tenth Cir. 1965).

2. If a party is not asserting a good faith interpretation of the contract terms, that fact may be evidence that he is repudiating the agreement. "The persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with a continuing intention to observe contractual obligations." (citations omitted). *Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp.*, 411 F.2d 889, 895 (Ninth Cir. 1969).

3. A demand for performance going beyond the terms of the original contract constitutes anticipatory repudiation. *See Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 290 (Seventh Cir. 1974). Missouri law is in accord. *National Farmer's Organization v. Bartlett & Co., Grain*, 560 F.2d 1350, 1357 (Eighth Cir. 1977); *Miran Investment Co. v. Medical West Bldg. Corp.*, 414 S.W.2d 297 (Mo. 1967).

4. The doctrine of breach of contract by anticipatory repudiation works harsh results, and for its application there must be a positive statement by the breaching party indicating that he will not substantially perform his contractual obligations. *Regional Enterprises, Inc. v. Teachers Insurance and Annuity Assoc. of America*, 352 F.2d 768, 775 (Ninth Cir. 1965); 4 Corbin on Contracts § 973, at 911.

5. Section 2-610 of the Missouri Uniform Commercial Code (20 A V.A.M.S. § 2-610) provides in part:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
>
> . . .
>
> (b) resort to any remedy for breach (Section 2-703 or Section 2-711),
>
> . . .
>
> (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article . . .

6. The following official code comments to § 2-610 are instructive:

> when repudiation substantially impairs the value of the contract the aggrieved party may at any time resort to his remedies for breach . . .

> The most useful test of substantial value is to determine whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.
>
> 2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation.
>
> . . .
>
> a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

7. Seller intended to impose on Purchaser a condition which was not part of the original contract and demanded that it would treat non-compliance with that additional condition as a breach of the contract. Accordingly Seller has repudiated the 1979 Amendment by manifesting a positive intention not to perform the contract according to its terms.

8. The Court recognizes that this is a unique case. Generally when a party repudiates a contract by refusing to perform except on conditions which go beyond the contract, no further performance of any kind results. *E.g., Westinghouse Electric Corp. v. CX Processing Labs*, 523 F.2d 668 (Ninth Cir. 1975). In this case, Seller's repudiation virtually assured that coal deliveries would, in fact, continue. Had Seller been successful in forcing Pur-

chaser to compare Seller's F.O.B. mine price to a competitor's F.O.B. mine price plus transportation, it would have been almost impossible for any qualified producer to "take" Seller out of the contract.

9. The Court concludes that Seller's breach substantially impaired the value of the contract, thereby entitling Purchaser to termination of the contract.

10. Seller has cited *Chandler v. Hunter*, 340 So.2d 818 (Ala. App. 1976) for its proposition that there can be no cause of action for breach of the "good faith" requirement contained in 20 A V.A.M.S. § 1-203. This Court is not persuaded by the *Chandler* opinion. This Court's analysis of § 1-203 and the applicable law leads to a different conclusion.

11. Section 1-203 provides as follows:

> Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

The official comments to § 1-203 provide in part:

> This section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties.

12. In determining whether Purchaser can, in fact, maintain an action against Seller for breach of the obligations contained in § 1-203, the Court makes reference to 20 A V.A.M.S. § 1-106(2) which provides as follows:

> (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

The official comments to § 1-106(2) would certainly seem to contemplate the possibility of bringing a lawsuit for breach of obligations such as the obligation of good faith contained in § 1-203.

> 2. Under subsection (2) any right or obligation described in this Act is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect.

13. In *Baker v. Ratzlaff* 564 P.2d 153 (Kan.App. 1977), the Court held that the Defendant's failure to comply in good faith with the termination provisions of a contract constituted a violation of §1-203 of the U.C.C. Specifically, the Kansas Court found that the Defendant had breached his obligation of good faith by declaring a termination of the subject contract upon a technical pretense.

In the *Baker* case, the Defendant, a popcorn farmer, terminated his contract with plaintiff, a popcorn distributor, based upon plaintiff's failure to pay for initial shipments of popcorn delivered to plaintiff. Delivery had occurred only one week before Defendant cancelled the contract. The contract between the parties required that Plaintiff pay upon delivery. As the appellate court noted:

> There was substantial competent evidence in the record to support the district court's finding that defendant had breached his obligation of good faith. His failure on delivery of either load of popcorn to the Strafford plant to demand payment, his failure in the subsequent telephone conversations with plaintiff and Martin to demand payment, and his hasty resale of the popcorn to another buyer at a price nearly double the contract price, provided the trial court with ample evidence upon which to find an absence of good faith.

Id. at 157. The Court held that the termination clause of the contract was an inseparable incident of enforcement of the substantive provisions of the contract, thereby invoking the "good faith" obligations found in § 1-203.

14. This Court agrees with the rationale of the Kansas Court. Very few reported cases deal with claims raised under § 1-203. This is not surprising because the vast majority of contract cases where a party has breached his "good faith" obligations will fit neatly under other remedial provisions of the U.C.C. If the case at bar does not "fit" under § 2-610, then, Purchaser should be allowed to utilize § 1-203 of the Code in seeking relief.

15. The Court concludes that the Missouri courts, if faced with an identical factual situation, would allow recovery for breach of contract based upon a party's failure to meet the contractual obligations contained in 20 V.A.M.S. § 1-203. The Missouri courts, both state and federal, recognize the contractual obligation of good faith. *See Bunge Corp. v. Recker,* 519 F.2d 449, 450 (Eighth Cir. 1975); *Missouri Public Service Co. v. Peabody Coal Co.,* 583 S.W.2d 721, 725 (Mo.App. 1979); *Accord, Admiral Plastics Corp. v. Trueblood, Inc.,* 436 F.2d 1335, 1338 (Sixth Cir. 1971).

16. As stated above, this Court finds and concludes that Seller's demand for more than it was entitled to under the contract constitutes repudiation under 20 A V.A.M.S. § 2-610. Even if the Court had not reached this conclusion, the Court would still be forced to conclude that Seller's actions constitute a breach of the 1979 Amendment. Seller's actions were not honest mistakes - Seller was attempting to gain unfair advantage by its demands on Purchaser. It was a calculated plan which Seller carried out from December of 1979 until April of 1981.

This Court cannot condone Seller's conduct. To allow Seller to retain the benefits of the contract would, in the opinion of this Court, result in an injustice. The Court concludes that Seller's violation of its contractual obligations of good faith constitutes a breach of the 1979 Amendment. Because of Seller's breach and repudiation, Purchaser is entitled to the remedy of cancellation. In addition, the extent of damages to which Purchaser is entitled will be determined in Phase III.

VII.

SELLER'S REMAINING CLAIMS

1. The Court finds that Purchaser's representatives worked very closely with prospective bidders in an attempt to obtain a bidder who qualified under the take-out clause. For example, Mr. Turner White, Purchaser's attorney, met with the principals of Quality Coal Company to suggest they use a holding company format so as to qualify as a "coal producing company." As one bidder testified, "they [Purchaser] stated that they were looking at litigation most certainly." (McGuire deposition, page 80).

2. This evidence does not establish that Purchaser acted in bad faith in its effort to cancel the contract. The Court finds that Purchaser's attempt the 1979 Amendment by virtue of its March 27, 1980 notice to Seller was made in good faith without intent to cause injury to Seller.

3. The Court finds that Purchaser's sampling and testing of coal under the 1979 Amendment was also performed in good faith.

4. The Court finds that, at the time Purchaser entered into the 1979 Amendment, it fully intended to perform in good faith under the terms and conditions of the contract.

CONCLUSIONS OF LAW

1. It is a well-accepted principle of law in Missouri that one who first breaches a contract cannot maintain an action against the other party for failure to perform. *Nevato v. Sletten*, 560 F.2d 340, 346 (Eighth Cir. 1977); *Rutledge v. Miller*, 248 F.Supp. 994, 997 (E.D. Mo. 1965); *Boten v. Brecklein*, 452 S.W.2d 86, 92 (Mo. 1970). A party to a contract cannot claim its benefits if he is the first to violate it. *Air-Craft Cabinet, Inc. v. Watajo, Inc.*, 540 S.W.2d 918, 926 (Mo.App. 1976); *S.C. Adams Printing v. Central Hardware Co.*, 572 S.W.2d 625, 629 (Mo.App. 1978).

2. In addition, good faith, honesty and adherence to commercial or business standards are inherent in the right to maintain an equitable action for specific performance of a contract. *Missouri Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725 (Mo.App. 1979).

3. Accordingly, under Missouri law, the Court's conclusion that Seller breached the 1979 Amendment on December 28, 1979, bars Seller from recovering for any subsequent breaches of that contract by Purchaser.

4. In any event, the Court concludes that Purchaser has neither breached the contract nor committed any tortious behavior towards Seller.

5. Seller is not entitled to recover on any of its claims asserted against Purchaser.

VIII.

"QUALITY COAL" CLAIMS

1. The 1980 American Society for Testing and Materials (ASTM) Book of Standards (Defendant's exhibit #79) states that coal is one of the most difficult of mate-

rials to sample. The Court heard much testimony on the sampling techniques carried out by Purchaser and Seller. The Court notes that, historically, both parties sought to refine and improve their sampling techniques.

2. As early as July of 1979, Mr. Hirlinger suggested to Mr. McMahan that the parties engage an independent laboratory to sample and test the coal shipped under the contract.

3. There is evidence that City Utilities employees were familiar with ASTM sampling techniques as early as April of 1978.

4. It is clear that Purchaser did not want to engage an independent laboratory for sampling because Purchaser itself had set up its own central laboratory. Purchaser considered its facilities and personnel competent to do the job.

5. The Court finds that although Purchaser did experience difficulties with its sampling system (See Plaintiff's exhibit # 88; Defendant's exhibit # 70), there is no evidence that Purchaser intentionally or in bad faith tried to sample in a manner which would be disadvantageous to Seller.

6. The Court is convinced that Purchaser's sampling techniques were not as sophisticated as they could have been. Under the circumstances, however, the Court finds that Purchaser's techniques were reasonable.

7. It is unfortunate that Purchaser and Seller did not make provisions in the 1979 Agreement for independent sampling and testing of the coal. The Court notes that the ASTM strongly recommends that the parties agree beforehand how sampling will be conducted. The Court also notes that hindsight is inevitably clearer than foresight.

8. It is not possible to determine at this point the percentage accuracy or range of chance error on the sampling systems the parties employed and the test results they produced.

9. The Court finds that the most reliable sampling techniques were employed by Mr. Luman and Mr. Mayer on behalf of Seller.

10. The Court finds that Seller tried to meet the contract specifications on every load of coal shipped to Purchaser and never knowingly shipped deficient coal.

11. The Court finds, to a large extent, the quality disputes which have arisen in this litigation result from the general lack of trust between the parties.

CONCLUSIONS OF LAW

1. The Court concludes both Purchaser's and Seller's sampling and testing programs were carried out in good faith. Neither were on the whole, commercially unreasonable.

2. For the purpose of analyzing Purchaser's breach of warranty and repudiation claims, the Court has used what it considers to be the most reliable test results - those garnered from samples taken by Luman's Laboratories and Standard Laboratories.

3. The Court concludes that Seller, on occasion, failed to meet the contract specifications in the coal it shipped to Purchaser. These deficiencies, however, did not rise to the level of substantially impairing the value of the contract as required by 20 A V.A.M.S. § 2-612(3).

4. The Court further concludes that the deficient coal shipments did not constitute an anticipatory repudiation of the contract as contemplated by 20 A V.A.M.S. § 2-610.

5. The Court concludes that Purchaser has failed to establish its warranty claims based upon the deficiencies in the coal shipped by Seller. Although Purchaser wanted more BTU's than it received from Seller, the coal shipped to Purchaser was fit for its intended use and was in fact so used. Purchaser is not entitled to recovery on its warranty claims.

IX.

PRICE DISCLOSURE QUESTION

The Court, in response to Purchaser's Request for supplemental findings of fact and conclusions of law makes the following findings and conclusions on Purchaser's disclosure of Seller's price in January, 1980.

1. At the outset, the Court notes that this is not a "pure" competitive bidding situation. Purchaser was not required to publicly solicit bids on the contract every year. In fact, under the terms of the contract, Seller could have submitted its price yearly for 5 years and Purchaser could have accepted that price without reservations, without "testing" that price against the coal market by publicly soliciting bids.

2. As the Court noted in its Findings of Fact and Conclusions of Law on Phase I, Purchaser viewed the "take-out" clause as a means of assuring itself of paying a fair market price for coal purchased under the contract.

3. The way the contract was structured, Seller's tendered price was not considered to be a bid. The "public bidding" aspect of the contract only came into play when and if Purchaser decided to solicit such bids. Once that decision was made, Purchaser was, of course, required to follow its rules and regulations regarding public bidding.

4. Although the bidders solicited by Purchaser may have known the "bottom line" on what price could take Seller out of the contract, these bidders had to compete fairly against each other for a realistic price at which to sell their coal for the upcoming year. In addition, these bidders had to meet the rigorous requirements contained in paragraph 5. Those requirements are detailed by the Court in the Findings of Fact and Conclusions of Law on Phase I at page 18.

5. Given the transportation cost advantages Seller had by virtue of its mine's proximity to Purchaser's power plant, it would not be easy for any qualified producer to undercut Seller's delivered price by the required margins. Furthermore, it is unlikely that any producer of coal would commit itself to a contractual price which would not guarantee some profit.

6. If Seller's tendered price were to be strictly construed as a "bid", then Purchaser would not have been able to give it the preferential treatment that Seller's price received in relation to the bids publicly solicited by Purchaser.

7. Seller realized back in December of 1979 that its price was, in effect, public information. (See Plaintiff's exhibit # 36).

CONCLUSIONS OF LAW

1. The contract itself made no provision regarding dissemination of Seller's price.

2. Seller's price for the upcoming year was not a competitive bid.

3. Purchaser had no obligation to keep secret Seller's submitted price.

4. To the contrary, once Seller's price was received, it became a public record, subject to disclosure under the Missouri Open Meeting Act, V.A.M.S. § 610.010 *et seq.* Seller's 1980 price was announced in an open meeting of the Board and was reported in the Springfield newspapers. The Court concludes there was nothing improper about this conduct.

X.

CONCLUSION

The Court has determined, based upon a careful review of the facts, the evidence and the law, that the 1979 Amendment was effectively breached and repudiated by Seller on December 28, 1979. This breach and repudiation entitled Purchaser to cancel the 1979 Amendment, effective as of that date. The Court-ordered injunction which required the parties to perform under the terms of the 1979 Amendment is, therefore, no longer necessary or appropriate and is hereby dissolved.

The trial of Phase III is scheduled on June 1, 1982, at 9:30 A.M. for the purpose of determining the amount of damages to which Purchaser is entitled. A final pretrial in preparation for Phase III is scheduled for March 30, 1982 at 9:30 A.M. The parties are instructed to submit trial briefs on the damages issue or issues by May 3, 1982. As the Court has previously stated, the question of attorneys' fees is reserved until the conclusion of Phase III.

It is so Ordered this 28th day of January, 1982.

/s/ James O. Ellison
James O. Ellison
United States District Judge

APPENDIX F

(Filed January 29, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

No. 81-C-127-E

BILL'S COAL COMPANY, INC., et al.,
Plaintiffs,

vs.

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD,
MISSOURI, et al.,
Defendants.

ORDER

The Court, having entered its Findings of Fact and Conclusions of Law on Phase II of the related litigation, *City of Springfield, et al., v. Bill's Coal Company, et al.*, Nos. 80-C-187-E and 80-C-580-E (consolidated), finds it necessary to review the injunction entered in this case.

In the related case, the Court has concluded that Seller breached and repudiated the subject contract as of December 28, 1979. Accordingly the injunction previously entered by the Court in this case on April 9, 1981 is no longer necessary or appropriate, and is hereby dissolved.

It is so Ordered this 29th day of January, 1982.

/s/ James O. Ellison
James O. Ellison
United States District Judge

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

No. 82-773

In the Supreme Court of the United States

October Term, 1982

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
Petitioners,

vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether This Court Should Accept for Certiorari Review the Court of Appeals' Interlocutory Ruling That the Coal Company Did Not Breach or Repudiate the Contract Under Missouri Law.

2. Whether the Court of Appeals Clearly Erred in Its Application of Missouri Contract Law or Clearly Abused Its Equitable Discretion in Reinstating and Continuing Preliminary Injunctive Relief.

The caption of the case contains the identity of all interested parties. Respondents mailed and filed with this Court on November 19, 1982, a listing of corporate ownership pursuant to Supreme Court Rule 28.1. That statement is still accurate.

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No. 82-773

In the Supreme Court of the United States

October Term, 1982

BOARD OF PUBLIC UTILITIES OF SPRINGFIELD, MISSOURI, d/b/a CITY UTILITIES, and CITY OF SPRINGFIELD, MISSOURI,
Petitioners,

vs.

BILL'S COAL COMPANY, INC. and WILLIAM D. PATCH, SAVANNA LEE PATCH, LLOYD F. BURKDOLL, ANNA FAYE BURKDOLL, JOHN E. BURKDOLL and VIRGINIA L. BURKDOLL, all the general partners of and d/b/a CHEROKEE COAL COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Nature of the Case

This diversity litigation involves three consolidated cases between petitioners and respondents. The cases, which are now awaiting final judgment, are pending in the United States District Court for the Northern District

of Oklahoma (the "District Court"). The actions all involve a Missouri coal contract governed by the Missouri Uniform Commercial Code. The contracting parties are before this Court by virtue of an interlocutory ruling of the United States Court of Appeals for the Tenth Circuit (the "Court of Appeals"). On July 6, 1982, the Court of Appeals continued a preliminary injunction which the District Court had dissolved on January 29, 1982. That dissolution was based solely on a legal determination that the coal contract had been breached and repudiated by respondents according to Missouri law. The petitioners, the City of Springfield, Missouri and the Board of Public Utilities of Springfield, Missouri, d/b/a City Utilities ("the Utility"), seek to overturn the interlocutory ruling on Missouri state law made by the Court of Appeals.

Statement of Facts*

The contract in dispute (referred to in the litigation as the "1979 Amendment") is a five-year coal supply agreement. (App. D, at A17-18). It was negotiated and executed in April of 1979. (App. D, at A23-24). Respondents Bill's Coal Company, Inc. and its six individual owners, who are the concurrent general partners of Cherokee Coal Company (the "Coal Company"), are the seller and coal supplier under the contract. (App. A, at A3). The Utility is the coal buyer. (*Id.*). The Coal Company is obligated to sell and the Utility is obligated to buy up to 605,000 tons of coal during each fiscal year (April 1 to March 31) that the contract is in effect. (Petition, at 3-4; App. A, at A3).

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*The Statement of Facts and Course of Proceedings are taken from the District Court's Phase I (Appendix D) and Phase II (Appendix E) opinions and the majority opinion of the Court of Appeals. (Appendix A). These Appendices, which are a part of the Utility's petition, are hereinafter referenced as "App. ....."

Numbered paragraph 5 of the contract provides that the Coal Company must notify the Utility before January 1 of the price it will charge for coal during the succeeding fiscal year. (App. A, at A4; App. D, at A30-31). After that notification, the Utility has until the end of March to solicit bids from other coal suppliers. (*Id.*). If a qualified alternative supplier is able to meet the contract specifications and submits a bid price to supply coal to the Utility at least 25% under the Coal Company's quoted price for the upcoming fiscal year, the Utility can immediately terminate the contract with the Coal Company effective March 31. (*Id.*) This unilateral termination or "take-out" clause can only be invoked by the Utility. (*Id.*). It requires no act or performance on the part of the Coal Company, except the tender of the Coal Company's quoted price. (*Id.*).

According to the contract, the Coal Company is to quote its new fiscal price "f.o.b." its Garland, Kansas mine. (*Id.*). The Utility then pays for transporting the coal to its power plants around Springfield, Missouri. (*Id.*). The contract interpretation dispute which resulted in the dissolution of injunctive relief and a reinstatement of the same by the Court of Appeals arose with regard to the meaning of the 25% price comparison language in the termination clause. (App. A, at A3; App. D, at A24). The contract language provides that the 25% provision is satisfied if the Utility accepts a bid from a qualified coal producer "at a *delivered price* of at least 25% less than the *price quoted* by [the Coal Company]." (App. D, at A30) (emphasis added).

On December 28, 1979, representatives of the Coal Company delivered a letter to the Utility containing the Coal Company's quoted f.o.b. mine price for fiscal year 1980.

(App. D, at A34; App. E, at A52). During a meeting that same day, general counsel for the Coal Company stated to the Utility's general manager that the language of the termination clause provided that the Utility could not terminate the contract unless a competitor's bid price, together with the expected freight cost for delivery of coal to the Utility, was at least 25% less than the f.o.b. mine price quoted in the Coal Company's letter ("delivered price versus f.o.b."). (*Id.*).[1] The Utility's general manager rejected that interpretation statement, claiming that the intended interpretation was to compare a bidder's price without freight to the Coal Company's quoted price without freight ("f.o.b. versus f.o.b."). (App. A, at A4-5; App. D, at A34-36). Coal shipments to the Utility for the balance (January to March) of fiscal year 1979 continued.

The Utility proceeded to solicit coal bids from alternative suppliers. (App. A, at A5; App. E, at A52-53). After receiving coal bids and making its "f.o.b. versus f.o.b." price comparison, the Utility claimed that the bids it received enabled it to immediately terminate the contract with the Coal Company under the 25% price comparison.[2] (App. E, at A53, A60). The Utility exercised that right and terminated the contract by its notice of March 27, 1980. (*Id.*). As a result of that termination, all coal shipments by the Coal Company to the Utility ceased.

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1. The Coal Company's general counsel and the Utility's general manager both participated in the negotiation of the contract in April of 1979. (App. D, at A22, A33-34).

2. In its termination notice, the Utility relied on the 25% provision and alternatively upon the 15% (one year hence) provision. The price comparison language is the same under both. Because the agreement was immediately terminated (25%) and the District Court concluded that both provisions could not be invoked simultaneously, the 15% provision has never been at issue. (*See* App. D, at A30, A39).

Course of Proceedings

Apparently unsure of its position, the Utility brought a declaratory judgment action against the Coal Company at the same time it terminated the contract and refused to accept any more coal from the Coal Company. (App. A, at A5). The declaratory action sought a ruling of non-liability by the Utility for its termination. (*Id.*; App. E, at A53). In response, the Coal Company immediately filed its own suit claiming the Utility had breached and repudiated the contract by its wrongful termination of March 27, 1980. (App. E, at A53). In addition, the Coal Company moved for a preliminary injunction to require the Utility to perform the agreement pending the litigation. (*Id.*). After an evidentiary hearing and with the consent of the Utility, the preliminary injunction was issued by the District Court on April 18, 1980. (*Id.*). Coal shipments by the Coal Company resumed. Thereafter, the Utility amended its pleadings to affirmatively assert antitrust and breach of warranty (based on coal quality) claims against the Coal Company. (App. A, at A5; App. E, at A70-71). Both cases were consolidated for all purposes (hereinafter the "1980 case"). (App. A, at A5; App. E, at A54).

During the first months of 1981, the Utility again solicited bids from alternative coal suppliers. In March of 1981, the Utility again terminated the contract in reliance upon the 25% provision of the termination clause. Coal shipments by the Coal Company were refused. In response, the Coal Company instituted in the District Court another breach of contract action against the Utility and moved for a preliminary injunction to require the Utility to perform the contract pending the litigation (hereinafter the "1981 case"). Following an extended evidentiary hearing, the requested preliminary injunction was issued on April 9, 1981. Coal shipments by the Coal Company re-

sumed. Trial of the 1981 case was held in abeyance pending the outcome of the 1980 case.

In the early stages of the litigation, both parties contended that the termination clause was not ambiguous and that it should be interpreted on its face. (App. A, at A4). However, the parties urged different interpretations. The Utility claimed that the termination language provided for an "f.o.b. versus f.o.b." price comparison. (App. D, at A34, A36). The Coal Company asserted, as it had on December 28, 1979, that the unambiguous language required a "delivered price versus f.o.b." comparison. (*Id.*). Nevertheless, the parties agreed that the 1979 Amendment was a Missouri contract governed by Missouri law, including the Missouri Uniform Commercial Code (the "Missouri Code"). (Petition, at 13; App. D, at A24).

At the final pretrial stage of the 1980 case, the parties agreed to waive a jury and to try the case in there phases: Phase I to interpret the contract; Phase II to determine whether either party was in breach; and Phase III to determine any damages and relief due. (App. A, at A5; App. D, at A18). At the same time, the Coal Company amended its allegations to assert that the termination clause was ambiguous and that the subjective intent of the parties was to compare the Coal Company's quoted f.o.b. price plus freight to the bidder's f.o.b. price plus freight ("delivered price versus delivered price"). (Petition, at 7; App. D, at A31). The Utility continued to argue that the clause was not ambiguous. Its interpretation position also remained the same ("f.o.b. versus f.o.b.").

During the trial of Phase I, extensive parol testimony was permitted. (App. D, at A18-35). The witnesses for the Coal Company testified that they believed the contracting parties intended the comparison to be "delivered price

versus delivered price." (App. D, at A32-33). The Utility's witnesses said they believed the comparison the parties intended was "f.o.b. versus f.o.b." (App. D, at A34). The parties also testified about their meeting on December 28, 1979. (*Id.*). After the Phase I trial, the District Court concluded that the clause was ambiguous. (App. D, at A35). It then found that the comparison under the termination clause was "intended to be a reciprocal delivered price comparison" or "delivered price versus delivered price." (App. D, at A37). The interpretation urged by the Utility was rejected. (App. D, at A35-37). Although the District Court did not adopt the Coal Company's literal interpretation of "delivered price versus f.o.b.," the Phase I opinion noted that such an interpretation was "plausible." (App. D, at A35-36).

Based on its conclusions and findings in Phase I, the District Court ruled that the Utility had wrongfully terminated the contract by its notice of March 27, 1980. (App. A, at A6). However, the Utility was granted leave to amend its pleadings after the Phase I trial to claim that the Coal Company had breached and anticipatorily repudiated the contract on December 28, 1979 by asserting a literal contract interpretation ("delivered price versus f.o.b.") that was different from the subjective interpretation ("delivered price versus delivered price") asserted by the Coal Company during the trial of Phase I. (App. A, at A5; App. D, at A40).

After Phase II, the District Court ruled in favor of the Utility on its amended claim of breach and repudiation. (App E, at A74). It concluded that the Coal Company had committed a "bad faith" breach under Section 400.1-203 and had also anticipatorily repudiated the contract under Section 400.2-610 of the Missouri Code by asserting on December 28, 1979, an interpretation of the termination

clause which was different from what the Coal Company believed the clause to mean based on the parties' subjective intent. (App. E, at A62-67). Based on that conclusion, the District Court dissolved injunctive relief in both the 1980 case and the 1981 case. (App. E, at A74; App. F).

The Coal Company immediately appealed the dissolution ruling to the Court of Appeals pursuant to 28 U.S.C.A. § 1292(a)(1) (West 1966). (App. A, at A3). After briefing by the parties, injunctive relief was reinstated pending the appeal. (*Id.*). Following full briefing and oral argument, the Court of Appeals decided on July 6, 1982, that the Coal Company did not breach or repudiate the agreement. (App. A, at A7). The Court of Appeals found that "the trial court had erred in its application of the law on the only issue found against [the Coal Company] in Phase II of the trial"; accordingly, the Court of Appeals ordered that the injunctive relief it reinstated on April 22, 1982 "should be continued in effect." (App. A, at A8).

On August 9, 1982, the Utility's petition for rehearing or for rehearing en banc was denied. (App. C). The litigation was remanded to the District Court and the appellate mandate was issued. The District Court proceeded with the processing of Phase III. During the trial of Phase III, the Utility filed with this Court its petition for a writ of certiorari to the Court of Appeals.[3] Phase III has been completed and the parties are now awaiting the District Court's supplemental Phase II opinion and its findings of fact and conclusions of law on Phase III. Final judgment should follow the entry of those opinions.

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3. The Utility seeks to invoke this Court's certiorari jurisdiction under 28 U.S.C.A. § 1254(1) (West 1966). (Petition, at 2). However, at the time the Utility's petition was filed with this Court the litigation between the parties was "*in*" the *District Court*. 28 U.S.C.A. § 1254 (West 1966) (emphasis added).

SUMMARY OF ARGUMENT

The Utility's petition seeks review by this Court of an interlocutory ruling by the Court of Appeals that the Coal Company did not breach or repudiate the contract under Missouri state law. Review of that ruling should be denied because the petition does not come within the criteria of Supreme Court Rule 17, and this Court has traditionally refused to review state law questions. Review should further be denied because the petition is not ripe and it raises no substantial question that is important or suitable to general application. Finally, the Utility has wholly failed to show that the Court of Appeals clearly erred in its application of Missouri contract law or that it otherwise clearly abused its equitable discretion in reinstating and continuing injunctive relief.

ARGUMENT

I.

This Court Should Not Accept for Certiorari Review the Court of Appeals' Interlocutory Ruling That the Coal Company Did Not Breach or Repudiate the Contract Under Missouri Law

The petition before this Court involves the application of Missouri contract law. It is without dispute that the District Court dissolved injunctive relief based on its conclusion that, under Missouri law, the Coal Company's statement of contract interpretation on December 28, 1979 constituted a breach and anticipatory repudiation of the 1979 Amendment. The Court of Appeals held that the District Court erred in its application of Missouri contract law, thereby warranting the reinstatement and continuation of injunctive relief. Neither the District Court nor the Court of Appeals relied upon any federal statute, rule, right or constitutional provision in connection with their rulings and the Utility did not raise any federal issue.[4] Accordingly, the first question presented to this Court is whether certiorari should properly be granted to review the Court of Appeals' application of Missouri contract law.

The Utility's petition makes no reference to Rule 17 of this Court. That is understandable since the petition does not come within any of the three categories of Rule 17. Those categories indicate the criteria generally considered by this Court in measuring the exercise of certiorari review. In addition, the Utility has not shown that the Missouri contract law issue it seeks this Court to review is "special and important." Rule 17(1), Sup. Ct. R. (1980).

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4. To the extent that the Utility is attempting to *now* create and raise some federal issue before this Court, it should not be permitted. *See, e.g., Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975).

This Court has a long tradition of declining review of state law questions. *See, e.g., Butner v. United States,* 440 U.S. 48, 58 (1979); *Pierson v. Ray,* 386 U.S. 547, 558 n.12 (1967); *Wolf v. Weinstein,* 372 U.S. 633, 636 (1963). The Utility has presented no compelling or important reason for this Court to depart from that precedent in the circumstances of this litigation. Moreover, the breach of contract argument asserted by the Utility in the lower courts and in its petition before this Court not only lacks support in Missouri law, but it finds no support in the contract law of any other state.

The decision by the Court of Appeals on Missouri contract law could in no way be characterized as a ruling that is in conflict with the highest state court (Supreme Court) in Missouri. In addition, the Court of Appeals' ruling is not in conflict with Missouri's intermediate appellate courts, nor is it in conflict with Missouri law as established by the United States Court of Appeals for the Eighth Circuit and the federal district courts sitting in Missouri. Furthermore, the ruling is not in conflict with the decisions of other federal and state courts. The contract law question decided by the Court of Appeals is not only consistent with Missouri law, but it is in accordance with other state and federal decisions that have reviewed a similar question of contract law.

In addition to the above, there are pragmatic reasons which support the refusal to grant certiorari. First, the ruling sought to be reviewed is interlocutory in nature and there has not been a final judgment entered in the litigation between the parties. Thus, even if this was a circumstance that might be appropriate for certiorari review, it is not ripe for such a review. *Cf. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,* 389 U.S. 327, 328 (1968); *Hamilton-*

Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 257-58 (1916). Second, the Court of Appeals only considered one of the three arguments raised by tne Coal Company. The other two arguments are equally meritorious. Third, the petition presents no issue which is likely to occur elsewhere or which will have an impact on a great number of litigants. The legal question sought to be reviewed is purely one of Missouri state contract law under a unilateral termination clause setting. Any decision on the merits that might be rendered by this Court under the facts presented would have very limited application in any other circumstance.

The Utility's petition is wholly inappropriate for discretionary review by this Court under its certiorari jurisdiction.

II.

The Court of Appeals Did Not Clearly Err in Its Application of Missouri Contract Law, Nor Did the Court of Appeals Clearly Abuse Its Equitable Discretion in Reinstating and Continuing Preliminary Injunctive Relief

In its amended pleadings in the District Court, the Utility claimed that the statement of contract interpretation made by the Coal Company on December 28, 1979 was both a "bad faith" breach of the contract under Section 400.1-203,[5] *and* an anticipatory repudiation of the agreement under Section 400.2-610 of the Missouri Code. The District Court concluded in Phase II that the legal "position" taken by the Coal Company on December 28, 1979

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5. That Missouri Code Section provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Section 400.2-103(1)(b) of the Missouri Code then provides that "'good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

was a "bad faith" breach of the contract because the interpretation urged was contrary to the Coal Company's belief as to the subjective intent of the parties. (App. A, at A6; App. E, at A65-67). The District Court had earlier found in Phase I that the "delivered price versus f.o.b." interpretation urged by the Coal Company was "plausible," and that the Utility had wrongfully exercised the termination clause based on its own erroneous interpretation on March 27, 1980. (App. A, at A6; App. D, at A35-36). The District Court also concluded in Phase II that the Coal Company's interpretation statement of December 28, 1979 was an anticipatory repudiation under Section 400.2-610 because it manifested an intention by the Coal Company not to abide by the terms of the contract. (App. A, at A6; App. E, at A64). Based on those legal determinations, the District Court concluded that the Utility would be entitled to the Missouri Code remedy of cancellation. (App. A, at A6). Therefore, the court granted the Utility's motion to dissolve all injunctive relief. (*Id.*).

On appeal, the Coal Company raised three objections to the conclusions in support of the dissolution ruling. (*Id.*). First, it argued that Missouri courts have not and would not recognize a right of action based on a contracting party's failure to comply with the Missouri Code's good faith obligation under these facts. (*Id.*). Secondly, the Coal Company asserted error in the "bad faith" determination since the District Court had found in Phase I that the Coal Company's interpretation statement of December 28, 1979 was "plausible." (App. A, at A6-7; App. D, at A35-36).[6] In its third assignment of error the Coal

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6. That interpretation was based on the Coal Company's reading of the literal contract language in conjunction with the legal advice of the Coal Company's general counsel that the termination clause was not ambiguous. *See Willman v. Beheler*, 499 S.W.2d 770, 774-75 (Mo. 1973). The Utility has consistently asserted that the clause is not ambiguous.

Company argued that, even if it had allegedly acted in "bad faith" and even if Missouri courts would generally recognize such a statement of contract interpretation as a breach or repudiation, when the alleged "bad faith" was limited to espousing an interpretation of the circumstances under which the Utility could properly exercise the termination clause and the statement did not otherwise interfere with the performance of either party under the contract, the conduct could not and did not give the Utility a right to cancel the contract. (App. A, at A7).

The Court of Appeals did not address the first two arguments made by the Coal Company. (*Id.*). Instead, the court agreed that the Coal Company's conduct, however characterized, could not be regarded as a contract breach or repudiation. (*Id.*). The Court of Appeals found that "[i]n urging an interpretation of the termination clause it knew did not reflect the parties' intent, [the Coal Company] did not affect either party's performance under the contract." (*Id.*). The opinion emphasized that an assumed bad faith assertion ". . . of a particular interpretation of a termination clause is neither a failure to perform contract obligations (breach) nor an indication that those obligations will not be performed in the future (repudiation)." (*Id.*).

In its petition, the Utility again fails to identify any performance by the Coal Company under the unilateral termination clause which the Coal Company could have breached or repudiated. The only performance requirement by the Coal Company under the clause is to tender its new fiscal price, which it did. Without some connection between the interpretation statement of December 28, 1979 and a failed performance by the Coal Company under the termination clause, there is no rational basis for a breach or repudiation. Any conclusion to the contrary would emas-

culate the fundamental principles of Missouri and all other contract laws.

In an attempt to create such a connection, the Utility again argues that the interpretation statement by the Coal Company allegedly deprived the Utility of its rights under the termination clause or prevented, hindered or frustrated the contract as a whole. (Petition, at 8, 11, 13). This argument is ludicrous. It is undisputed that the Utility knowingly and voluntarily *exercised* its unilateral termination right under the contract on March 27, 1980, three months after it wholly rejected the Coal Company's interpretation statement. That termination was subsequently found to be *wrongful* by the District Court.[7] The Coal Company was powerless to prevent that wrongful action before it occurred. The Utility alone had the right and power to act and did so; the Coal Company could only react. For the Utility to even insinuate that it could not and did not terminate the contract is a gross misstatement of the undisputed and determined facts.[8]

The Utility cites three Missouri and five non-Missouri cases to support its claim of error by the Court of Appeals.

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7. One of the reasons it was held wrongful was that the "f.o.b. versus f.o.b." interpretation affirmatively enforced by the Utility in its termination of March 27, 1980 was erroneous. The Utility has consistently asserted that its "f.o.b. versus f.o.b." interpretation is the *only* one intended by the parties and required by the literal language of the termination clause.

8. The Utility implies that the Coal Company breached and repudiated the contract by refusing to honor and accept the utility's wrongful termination of March 27, 1980. Adoption of such a legal argument would be contrary to Missouri public policy. *See, e.g., Cameron, Joyce & Co. v. State Highway Commission*, 166 S.W.2d 458, 461 (Mo. 1942). In essence, the Utility argues that a contracting party has no right to voice an opinion on the rights of another contracting party under a termination clause that can only be exercised by the latter. Neither Missouri nor any other state has adopted such a unique and dangerous proposition of contract law.

(Petition, at 11-18). All eight case references fail the Utility. Not one of the cases cited in the petition involved a termination clause or a contract setting that resembles the circumstance presented in this litigation. More importantly, none of the opinions cited depart from the basic contract principle, relied upon by the Court of Appeals, that a breach or repudiation of a contract must be grounded on an affirmative injurious act of failed contract performance. *See* Mo. Rev. Stat. §§ 400.2-601 to 608; 400.2-610; 400.2-612 (1978); *Restatement (Second) of Contracts* §§ 235, 241, 243, 245, 250 (1981); *Missouri Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d 721; 725 (Mo. App.), *cert. denied*, 444 U.S. 865 (1979); *Cardinal Stone Co., Inc. v. Rival Mfg. Co.*, 669 F.2d 395 (6th Cir. 1982); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138 (5th Cir.), *cert. denied*, 444 U.S. 938 (1979); *Chandler v. Hunter*, 340 S.W.2d 818, 821 (Ala. App. 1976). No such act or performance has ever been alleged, identified or proven by the Utility.

In its petition, the Utility further argues that ". . . the Court of Appeals' decision fails to recognize that the Coal Company's bad faith fraudulent conduct has a direct bearing upon its right to equitable injunctive relief." (Petition, at 11). In an attempt to support this reckless argument, the Utility fabricates accusations of "fraud" and "false affidavits, false testimony under oath, false answers to interrogatories, false pleadings, etc." (*Id.*). This desperate argument on the part of the Utility is wholly unsupported by the record.

The Utility urged the District Court on several occasions to dissolve injunctive relief because of the alleged "bad faith" or unclean hands of the Coal Company. The Utility vigorously urged the Court of Appeals to deny injunctive relief for the same reason. Neither the District

Court nor the Court of Appeals accepted that argument. Both lower courts had ample opportunity to deny injunctive relief on equitable grounds, but they declined to do so. Notwithstanding the Utility's characterization of the Coal Company's conduct, the Court of Appeals mandated that injunctive relief be continued. Thus, there was no "failure" on the part of the Court of Appeals to "recognize" the Coal Company's conduct when it reinstated and continued injunctive relief.

The Utility's reckless insinuation of "fraud," "false" testimony and "false" court papers is very disturbing to the Coal Company. Neither the District Court nor the Court of Appeals have ever characterized the conduct or papers of the Coal Company or its counsel as the Utility seeks to do. The character of advocacy exhibited in the Utility's petition before this High Court lends no respect to either the Utility or the record in the lower courts.

The Utility appears to be asking this Court to review the exercise by the Court of Appeals of its discretionary equitable powers. Such a review is not proper or warranted for several reasons. First, equitable review is narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Second, the granting of an injunction is discretionary and will not be reviewed or overturned absent a clear showing of an abuse of that discretion. *Brown v. Chote*, 411 U.S. 452, 457 (1973); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528, 535 (1960). And third, injunctive relief will not be undone lightly and only under a clear satisfaction of several standards. *United States v. Swift & Co.*, 286 U.S. 106, 119-21 (1932). The Utility has wholly failed to show, clearly or otherwise, that there is a compelling reason to review and find an abuse by the Court of Appeals of its discretionary equitable powers.

CONCLUSION

For all of the foregoing reasons, the Utility's petition for a writ of certiorari to the Court of Appeals should be denied and the Coal Company should be awarded such costs as deemed appropriate by this Court.

Respectfully submitted,

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